

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SUSAN MOORE, as Guardian and
Conservator of the ESTATE OF
JOSEPH DANIEL VELEZ, JR, an
Incapacitated Individual,

Plaintiff-Appellee,

v.

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89

Defendants-Appellants,

and

HENSLEY MFG, INC., a Michigan corporation,

Defendant.

SC: _____

COA No. 345101

Macomb CC: 17-002389-NO

**APPLICATION OF RICHARD SHAFER, KAREN SHAFER, R SHAFER BUILDERS, RICHARD N.
SHAFER AS TRUSTEE AND KAREN J. SHAFER AS TRUSTEE FOR LEAVE TO APPEAL FROM
DECISION OF THE MICHIGAN COURT OF APPEALS**

ORAL ARGUMENT REQUESTED

Richard M. Mitchell (P45257)
Jesse L. Roth (P78814)
MADDIN HAUSER ROTH & HELLER, P.C.
Attorneys for Defendants-Appellants
28400 Northwestern Highway
Southfield, MI 48034
(248) 827-1875
rmitchell@maddinhauser.com
jroth@maddinhauser.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF ORDER APPEALED AND DATE OF ENTRY..... iii

QUESTIONS PRESENTED iv

I. INTRODUCTION 1

II. STATEMENT OF FACTS AND MATERIAL PROCEEDINGS..... 2

 A. The underlying incident. 2

 B. The trial court correctly dismissed Shafer from this action..... 3

 C. The Court of Appeals majority, however, found that an open and obvious condition is per se unreasonably dangerous if the owner knew or should have known that an invitee would not take adequate safety precautions. 5

III. ARGUMENT 6

 A. Leave to appeal is warranted under MCR 7.305(B)(5) and MCR 7.305(B)(3) because the Majority Opinion is clearly erroneous, implicates a legal principle of major significance to this State’s jurisprudence, and directly conflicts with this Court’s precedent. 6

 1. The Majority Opinion erroneously departs from Michigan’s special aspects doctrine by holding, contrary to *Mann*, that a landowner’s knowledge that an invitee will not protect him or herself is enough to render an open and obvious condition unreasonably dangerous..... 7

 2. This Court held in *Perkoviq* that an icy sloped roof does not have special aspects as a matter of law..... 10

 B. Leave to appeal is also warranted under MCR 7.305(B)(5) because the Majority Opinion, which held there was a question of fact as to Shafer’s knowledge, is clearly erroneous and will cause material injustice. 15

 C. Leave to appeal is also warranted under MCR 7.305(B)(5) because the Majority Opinion, which assumed that “appropriate safety precautions would have prevented” Velez’s fall, is clearly erroneous and will cause material injustice..... 18

IV. STATEMENT OF RELIEF SOUGHT 19

TABLE OF AUTHORITIES

Cases

Bertrand v Alan Ford, Inc, 449 Mich 606, 609; 537 NW2d 185 (1995) 7

Bullard v Oakwood Annapolis Hosp, 308 Mich App 403, 410; 864 NW2d 591 (2014)..... 8

Craig v Oakwood Hosp, 471 Mich 67, 86; 684 NW2d 296 (2004) 18

Funk v General Motors Corp, 392 Mich 91, 104; 220 NW2d 641 (1974) 3

Hoffner v Lanctoe, 492 Mich 450, 462; 821 NW2d 88 (2012)..... 8, 11

Latham v Barton Malow Co, 480 Mich 105, 112; 746 NW2d 868 (2008) 9

Lowrey v LMPS & LMPJ, Inc, 500 Mich 1, 7-8; 890 NW2d 344 (2016)..... 17

Lugo v Ameritech Corp, Inc, 464 Mich 512, 516; 629 NW2d 384 (2001)..... 7, 8, 11, 14

Mann v Shusteric Enterprises, Inc, 470 Mich 320, 328-329; 683 NW2d 573 (2004)..... i, iii, 1, 8, 9, 10, 12, 13

People v Graves, 458 Mich 476, 480; 581 NW2d 229 (1988)..... 10

People v Tanner, 496 Mich 199, 250; 853 NW2d 653 (2014)..... 10

Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd, 466 Mich 11, 19-20;
643 NW2d 212 (2002) i, 1, 4, 5, 6, 11, 12, 13, 14

Pontiac School District v Miller Canfield Paddock & Stone, 221 Mich App 602; 563 NW2d 693 (1997) 18

Robinson v City of Detroit, 462 Mich 439, 464; 613 NW2d 307 (2000)..... 10

Skinner v Square D Co, 445 Mich 153, 163; 516 NW2d 475 (1994)..... 18

Other Authorities

2 Restatement Torts, 2d, § 343A, comment f, p. 220 7

Rules

MCR 2.116(C)(10) 3, 17

MCR 7.305(B)(3) i, iv, 6

MCR 7.305(B)(5) i, iv, 6

STATEMENT OF ORDER APPEALED AND DATE OF ENTRY

On January 30, 2020, the Michigan Court of Appeals issued a two-to-one split decision reversing the Macomb County Circuit Court's ruling that the "open and obvious" doctrine barred Plaintiff-Appellee Susan Moore's ("Moore") premises liability claim against Defendants-Appellants Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and Karen J. Shafer as Trustee (collectively, "Shafer"). The trial court issued its opinion after extensive oral argument, then hearing further arguments at the request of Moore. The Court of Appeals majority opinion held that a plaintiff may establish that an open and obvious condition is "unreasonably dangerous" by showing that the landowner should have known that the invitee, a commercial roofer, would not adequately protect him or herself from the condition. Shafer seeks leave to appeal this holding on the ground that it conflicts with *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004), and because it creates a heretofore-unknown and incredible duty for landowners in Michigan, including residential property owners having a roof put on their houses, to protect business invitees from open and obvious dangers that have no special aspects.

QUESTIONS PRESENTED

- I. Should this Court grant leave to appeal under MCR 7.305(B)(5) and MCR 7.305(B)(3) where the Court of Appeals majority issued a decision that departs radically from the “special aspects” doctrine, is clearly erroneous, implicates a legal principle of major significance to this State’s jurisprudence, and directly conflicts with precedent from this Court?

The Court of Appeals majority and Moore would answer: “No”

The Court of Appeals dissent and Shafer would answer: “Yes”

- II. Should this Court grant leave to appeal under MCR 7.305(B)(5) where the Court of Appeals majority opinion, which held there was a question of fact as to whether Shafer knew that Moore’s ward would use allegedly inadequate safety measures, is clearly erroneous and will cause material injustice?

The Court of Appeals majority and Moore would answer: “No”

The Court of Appeals dissent and Shafer would answer: “Yes”

- III. Should this Court grant leave to appeal under MCR 7.305(B)(5) where the Court of Appeals majority opinion, which assumed that “appropriate safety precautions would have prevented” the incident, is clearly erroneous and will cause material injustice?

The Court of Appeals majority and Moore would answer: “No”

The Court of Appeals dissent and Shafer would answer: “Yes”

I. INTRODUCTION

The Court of Appeals majority opinion found that an open and obvious condition is automatically rendered unreasonably dangerous when the landowner knows or has reason to know that an invitee will not take adequate safety precautions. See Appx. 6a-8a, January 30, 2020 Majority Opinion (“Majority Opinion”) at pp. 3-5, **Exhibit 1** to the Appendix. The majority then proceeded to analyze the record evidence and find a question of fact as to whether Shafer knew that Moore’s ward, Joseph Daniel Velez, Jr. (“Velez”) would use allegedly inadequate safety measures while performing work on Shafer’s roof. See Appx. 7a-8a, Majority Opinion at pp. 4-5. The dissenting opinion, which was absolutely correct on the other hand, maintained that a determination of whether a condition is unreasonably dangerous must focus on the characteristics of the condition itself, not the knowledge of the property owner, which patently is not a part of Michigan’s open and obvious doctrine. See Appx. 13a-14a, January 30, 2020 Dissenting Opinion (“Dissenting Opinion”) at pp. 2-3, **Exhibit 2** to the Appendix. Even assuming *arguendo* that the landowner’s knowledge was relevant (it is not), the Dissenting Opinion criticized the majority for relying on “a quantum leap of logic, piling inference upon supposition upon speculation” to find a question of fact as to the issue of Shafer’s knowledge. See Appx. 12a-13a, Dissenting Opinion at pp. 1-2.

The Court of Appeals Majority Opinion is contrary to this Court’s precedent, which has made clear that “special aspects are not defined with regard to whether a premises possessor should expect that an invitee will not discover the danger or will not protect against it, but rather by whether an otherwise open and obvious danger... imposes an unreasonably high risk of severe harm to an invitee.” *Mann*, 470 Mich at 331-332 (internal citations and quotation marks omitted). In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 19-20; 643 NW2d 212 (2002), this Court held that the danger of working on a roof does not impose an unreasonably high risk of severe harm as a matter of law. As for the issue of Shafer’s knowledge of whether Gill would use adequate fall protection, even if that was relevant (it is not), the Majority Opinion found a question of fact where there was none. The Majority Opinion also relied on

impermissible speculation to assume that Shafer could have prevented the accident. This Court should grant leave to appeal in order to restore the rule that a property owner in Michigan owes a duty to protect an invitee from an open and obvious condition only where the condition has special aspects, and that it is the non-movant's burden to establish his or her claims without resort to speculation.

II. STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. The underlying incident.

The late Richard Shafer was a landowner and industrial developer in Romeo, Michigan. See Appx. 17a, 18a, Deposition of Ray Shafer ("Shafer Deposition") at pp. 10, 15, **Exhibit 3** to the Appendix. The accident giving rise to this action occurred during a construction project on commercial property owned by Mr. Shafer and his wife's trusts, when Joseph Daniel Velez, Jr. fell while performing roofing work on the property.

Velez worked for a roofing subcontractor named Larry Gill ("Gill"), whom Shafer had hired to perform roofing work on a commercial building. See Appx. 23a-26a, Deposition of Larry Gill ("Gill Deposition") at pp. 8-11, **Exhibit 4** to the Appendix. Gill is an experienced roofer, having trained and begun working in the field in 1984. See Appx. 21a, Gill Deposition at p. 6. He obtained the status of journeyman roofer in 1991. See Appx. 22a, Gill Deposition at p. 7. Over the course of his career, Gill has worked on hundreds of roofing jobs. See Appx. 25a, Gill Deposition at p. 10. Gill first began working on roofing jobs with Velez in the year 2000, from which time they worked on dozens of roofing jobs together. See Appx. 21a-25a, Gill Deposition at pp. 6-10.

Gill and his crew completed the roofing job for Shafer in two days. See Appx. 26a, Gill Deposition at p. 11. Velez's job on the roofing crew was to serve as the "holler man," in which role Velez was responsible to alert co-workers when they were getting close to the edge of the flat roof. See Appx. 29a, Gill Deposition at p. 31. See also Appx. 31a, Photograph of Roof, **Exhibit 5** to the Appendix.

It was on the second day of the job when Velez fell off the roof. See Appx. 22a-23a, 26a, Gill Deposition at pp. 7-8, 11. Gill testified that he did not see Velez fall, he does not know how Velez fell, and nobody to his knowledge has any idea how Velez fell. See Appx. 27a, Gill Deposition at p. 14. No witnesses to the fall were identified in discovery. Velez himself is incompetent to testify as to what happened. In fact, despite extensive discovery, there was absolutely no evidence whatsoever as to what caused Velez's fall. There was no evidence that there was anything unusual about the roof. The cause of his fall was absolute speculation.

Gill further testified that it surprised him that Velez fell, because “[y]ou usually don’t fall off a flat roof, especially when you’re supposed to be the safety guy.” See Appx. 27a, Gill Deposition at p. 14.

B. The trial court correctly dismissed Shafer from this action.

Susan Moore, Velez's guardian and conservator, initiated litigation on June 14, 2017. In relevant part, her complaint included a claim for premises liability against Shafer. See Appx. 36a-38a, Complaint at ¶¶ 21-26, **Exhibit 6** to the Appendix.¹ After extensive discovery, including the depositions of nearly a dozen witnesses and the production of voluminous documents, Shafer moved for summary disposition under MCR 2.116(C)(10). See Appx. 41a-59a, Shafer's Motion for Summary Disposition (“Motion”), **Exhibit 7** to the Appendix. In its motion, Shafer argued that Moore had failed to establish her premises liability claim because the danger of falling off the roof was an open and obvious hazard that did not have any special aspects. See Appx. 48a-50a, Motion at pp. 7-9. In particular, Shafer argued that there is

¹ Moore's complaint also included a claim against Shafer, in its capacity as general contractor, under the “common work area” doctrine as recognized in *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974). See Appx. 38a-39a, Complaint at ¶¶ 27-37. Shafer successfully moved for summary disposition on the basis that Moore failed to establish that a significant number of workers of multiple subcontractors were exposed to the same risk of working at heights with allegedly inadequate fall protection, as required in order to establish her common work area claim. See Appx. 50a-55a, Motion at pp. 9-14; Appx. 114a-116a, June 6, 2018 Opinion and Order at pp. 7-9; Appx. 155a-157a, August 10, 2018 Opinion and Order at pp. 4-6. The Court of Appeals affirmed the trial court, holding that Gill's roofing crew – numbering seven people – did not amount to a significant number of workers for purposes of the common work area doctrine. See Appx. 8a-9a, Majority Opinion at pp. 5-6. This absolutely was the correct result, and is not an issue in this application.

binding Michigan Supreme Court precedent holding that a 20-foot-high roof is an open and obvious condition and is not unreasonably dangerous as a matter of law. See Appx. 49a-50a, Motion at pp. 8-9, citing *Perkoviq, supra*. Shafer also argued that Moore was relying on impermissible speculation to prove causation. See Appx. 56a-57a, Motion at pp. 15-16

Moore filed a response brief on May 25, 2018, in which she argued that summary disposition of her premises liability claims would be inappropriate because of evidence that the roofer Gill was not an “established” contractor. See Appx. 63a-65a, 71a-73a, Moore’s Response to Motion (“Response”) at pp. 3-5, 11-13, **Exhibit 8** to the Appendix. She also argued that causation should be decided by the factfinder. See Appx. 77a-78a, Response at pp. 17-18. Shafer filed a reply brief addressing Moore’s arguments. See Appx. 81a-87a, Shafer’s Reply Brief, **Exhibit 9** to the Appendix.

After the motion was fully briefed, the trial court set the motion for a hearing, which was held before visiting judge the Honorable James Biernat, Sr. on June 4, 2018. At oral argument, Moore’s counsel again focused on the issue that Gill did not have an “established” business, to which argument defense counsel again responded at length. See Appx. 88a-106a, June 4, 2018 Hearing Transcript, **Exhibit 10** to the Appendix. Judge Biernat took the motion under advisement and subsequently issued a written opinion, finding:

*[T]he Court finds that there is no question of fact that the condition of the roof of the addition to the Building was open and obvious, avoidable and not unreasonably dangerous. The Court is convinced that Plaintiff’s argument that the Shafer Defendants should have foreseen that Mr. Gill would not use fall protection or implement proper safety standards is without merit. As owner, the Shafer Defendants had no reason to foresee that the subject roof would be unreasonably dangerous, as the roof lacked any special aspects that would make it so the Shafer Defendants would expect that employees of Mr. Gill would fail to take necessary precautions to guard against the obvious danger of being on a roof. See *Perkoviq*, 466 Mich at 19.... Therefore, the Court must grant the Shafer Defendants['] motion for summary disposition of Plaintiff’s premises liability claim....*

Appx. 113a, June 6, 2018 Opinion and Order at p. 6, **Exhibit 11** to the Appendix.

Around the same time, Moore filed a motion for reconsideration of the trial court's decision granting Shafer's motion for summary disposition. See Appx. 117a-125a, Moore's Motion for Reconsideration, **Exhibit 12** to the Appendix. Shafer received permission from the trial court to respond to the motion for reconsideration, and submitted a brief in opposition. See Appx. 126a-137a, Shafer's Response to Moore's Motion for Reconsideration, **Exhibit 13** to the Appendix. Oral argument was held at an August 6, 2018 hearing, at which Moore's counsel acknowledged that the motion was "not presenting anything new, anything different". See Appx. 146a, August 6, 2018 Hearing Transcript at p 8, **Exhibit 14** to the Appendix. Judge Caretti indicated he would take the motion under advisement and, on August 10, 2018, issued an opinion and order denying Moore's motion for reconsideration, in which he re-analyzed all of Moore's arguments and reached essentially the same conclusions as had Judge Biernat in his opinion and order granting Shafer's motion for summary disposition. See Appx. 151a-157a, August 10, 2018 Opinion and Order, **Exhibit 15** to the Appendix.

C. The Court of Appeals majority, however, found that an open and obvious condition is per se unreasonably dangerous if the owner knew or should have known that an invitee would not take adequate safety precautions.

On August 20, 2018, Moore filed a claim of appeal. In her appeal, Moore argued in relevant part that the trial court erred in granting summary disposition because there was a question of fact as to whether the roof from which Velez fell was an unreasonably dangerous condition. In response, Shafer argued that this Court's *Perkoviq* decision was dispositive of Moore's premises liability claim. Shafer also argued that, although the trial court did not reach the issue, Moore relied on impermissible speculation to establish causation.

The Court of Appeals heard oral argument on October 3, 2019, and, on January 30, 2020, issued a split decision. The Majority Opinion reversed the trial court's grant of summary disposition to Shafer with respect to the premises liability claim. See Appx. 6a-8a, Majority Opinion at pp. 3-5. The panel majority understood *Perkoviq* to hold that knowledge on the part of a premises owner that an invitee will take

inadequate safety precautions will, by itself, render an open and obvious condition unreasonably dangerous, and further held that there was a question of fact as to whether Shafer had such knowledge in this case. See Appx. 6a-8a, Majority Opinion at pp. 3-5. As to Shafer's causation argument, the Majority Opinion remarked that, "regardless of what caused the fall, appropriate safety precautions would have prevented it. Thus, the term 'fall protection.'" See Appx. 8a, Majority Opinion at p. 5 n. 5. The Dissenting Opinion, on the other hand, criticized the majority for relying on "a quantum leap of logic, piling inference upon supposition upon speculation" to find a question of fact as to the issue of Shafer's knowledge, and in any event indicated that *Perkoviq* stands for the proposition that a determination of whether a condition is unreasonably dangerous should focus on the characteristics of the condition itself, not the knowledge of the property owner. See Appx. 12a-14a, Dissenting Opinion at pp. 1-3.

Because the Majority Opinion is contrary to well-established Michigan law and strong public policy considerations, Shafer seeks leave to appeal the Court of Appeals decision.

III. ARGUMENT

- A. Leave to appeal is warranted under MCR 7.305(B)(5) and MCR 7.305(B)(3) because the Majority Opinion is clearly erroneous, implicates a legal principle of major significance to this State's jurisprudence, and directly conflicts with this Court's precedent.**

Review is appropriate under MCR 7.305(B)(5) where the Court of Appeals "decision is clearly erroneous and will cause material injustice" or where it "conflicts with a Supreme Court decision." Leave to appeal is warranted under MCR 7.305(B)(3) where the issue involves "a legal principle of major significance to the state's jurisprudence." The Majority Opinion is clearly erroneous and directly conflicts with this Court's decision in *Mann, supra*, which holds that a landowner's knowledge that an invitee will not adequately protect him or herself from an open and obvious condition is irrelevant to the issue of whether the condition has special aspects. The Majority Opinion also conflicts with *Perkoviq, supra*, which holds that even an icy sloped roof does not have special aspects as a matter of law. There is no room in *Mann* or

Perkoviq for the panel majority's holding that Shafer's purported knowledge that Velez would use allegedly inadequate fall protection rendered the ordinary flat roof, which did not have any special aspects, unreasonably dangerous. Leave to appeal should be granted to protect this Court's precedent and the fundamental public policy that a landowner does not owe a duty to protect an invitee from the invitee's own failure to take adequate safety precautions against an open and obvious condition that does not have any special aspects.

- 1. The Majority Opinion erroneously departs from Michigan's special aspects doctrine by holding, contrary to *Mann*, that a landowner's knowledge that an invitee will not protect him or herself is enough to render an open and obvious condition unreasonably dangerous.**

The main issue in this application is whether a condition is per se "unreasonably dangerous," such that it automatically escapes application of the open and obvious doctrine in a premises liability case, when the property owner knows or should know that an invitee will not take adequate safety precautions. In general, a landowner owes a duty to exercise reasonable care to protect a business invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty generally does not encompass a duty to protect an invitee from "open and obvious" dangers on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Michigan's open and obvious doctrine was initially based on the Restatement of Torts. *Bertrand*, 449 Mich at 609. Under the Restatement approach, a premises possessor still retained a duty to protect an invitee from an open and obvious condition in a case where the possessor anticipated or should have anticipated that the condition would cause harm to the invitee notwithstanding its known or obvious danger. 2 Restatement Torts, 2d, § 343A, comment f, p. 220. "Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee... [will] fail to protect himself against it." *Id.*

In *Lugo, supra*, however, this Court replaced the Restatement approach with a “special aspects” analysis as follows:

[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

Lugo, 464 Mich at 517. Notably, this special aspects exception to the open and obvious doctrine is “limited” and “narrow.” *Hoffner v Lanctoe*, 492 Mich 450, 462; 821 NW2d 88 (2012). Thus, this Court has identified only “two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable.” *Hoffner*, 492 Mich at 463, citing *Lugo*, 464 Mich at 519. This application involves the former, and specifically the question of what constitutes an unreasonably dangerous condition.

According to *Lugo*, a determination of whether a condition is unreasonably dangerous must “focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.” *Id.* at 523-524. “Under this limited exception, liability may be imposed only for an ‘unusual’ open and obvious condition that is ‘unreasonably dangerous’ because it ‘presents an extremely high risk of severe harm to an invitee’ in circumstances where there is ‘no sensible reason for such an inordinate risk of severe harm to be presented.’” *Hoffner*, 492 Mich at 462, quoting *Lugo*, 464 Mich at 519 n. 2. “[A] common condition,” on the other hand, by definition is not “uniquely dangerous.” *Id.* at 463. Whether a condition is uniquely dangerous is a question of law for the trial court to decide. *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 410; 864 NW2d 591 (2014).

This Court solidified these principles in *Mann v Shusteric Enterprises, Inc*, holding that even if the landowner knows that a particular invitee will not protect him or herself from the condition of the premises, that “does not affect the legal duties [the owner] owes to plaintiff,” which depend solely on the characteristics of the condition itself. 470 Mich 320, 329-330; 683 NW2d 573 (2004). Put differently,

“special aspects are not defined with regard to whether a premises possessor should expect that an invitee will not discover the danger or will not protect against it, but rather by whether an otherwise open and obvious danger... imposes an unreasonably high risk of severe harm to an invitee.” *Id.* at 331-332 (internal citations and quotation marks omitted).

In *Mann*, the plaintiff patronized the defendant bar during a blizzard. *Id.* at 324. After the defendant served the plaintiff nine drinks in a three-hour period, the visibly intoxicated plaintiff exited the bar. *Id.* The plaintiff slipped, fell and was injured on ice and snow that the defendant had allowed to accumulate in the parking lot. *Id.* The Court of Appeals found that, “Defendant’s service of alcohol was implicated... as it related to defendant’s knowledge of plaintiff’s condition as relevant to whether defendant’s conduct in failing to inspect or clear the parking lot and failing to warn plaintiff was reasonable.” *Id.* at 329 (citation omitted). This Court, however, disagreed and held that “[a] visibly intoxicated person” has the same responsibility to protect himself or herself from an open and obvious condition “as a sober person.” *Id.* Thus, “defendant’s knowledge that plaintiff was intoxicated does not affect the legal duties it owes to plaintiff. That is, although defendant served plaintiff alcohol and was apparently aware that plaintiff was intoxicated, defendant does not owe plaintiff any heightened duty of care.” *Id.* at 329-330. In other words, where a landowner knows that an invitee is unable to protect him or herself from the condition of the premises, and even where it was the landowner who caused the invitee to be unable to protect him or herself, that still is irrelevant to the question of whether the condition itself “impose[d] an unreasonably high risk of severe harm to an invitee.” *See id.* at 331-332. The same conclusion is *a fortiori* warranted here, where Shafer did not cause Velez to use allegedly inadequate fall protection. Rather, job safety was the responsibility of the roofing subcontractor Larry Gill, not Shafer. *See Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008) (“the immediate employer of a construction worker is responsible for the worker’s job safety”).

“The application of stare decisis is generally the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *People v Tanner*, 496 Mich 199, 250; 853 NW2d 653 (2014) (citation and quotation marks omitted). “[U]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed.” *People v Graves*, 458 Mich 476, 480; 581 NW2d 229 (1988) (citation omitted). “Before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it.” *Id.* at 481 (citation omitted).

Factors for the Court to consider include whether there has been such reliance on the decision that overruling it would work an undue hardship, whether changes in the law or facts no longer justify the decision, and whether the decision defies practical workability. *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). Here, far from defying practical workability, the rule from *Mann* is both workable and supported by strong public policy considerations that a landowner owes a duty to protect an invitee from an open and obvious condition only where the condition has special aspects. Greater harm would result from the Majority Opinion’s holding that Michigan landowners now also owe a duty to protect invitees from the invitees’ own failure to take ordinary safety precautions against open and obvious conditions that do not have any special aspects.

2. This Court held in *Perkoviq* that an icy sloped roof does not have special aspects as a matter of law.

Having established that an owner’s knowledge about the care an invitee will take is immaterial to a determination of whether an open and obvious condition is unreasonably dangerous, the analysis shifts to focus on the condition itself and, more specifically, whether an ordinary flat roof has special aspects.

In *Lugo*, this Court explained that “an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.” *Lugo*, 464 Mich at 518. For example, “an unguarded thirty foot deep pit in the middle of a parking lot... would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken.” *Id.* Put differently, “liability may be imposed only for an ‘unusual’ open and obvious condition that is ‘unreasonably dangerous’ because it ‘presents an extremely high risk of severe harm to an invitee’ in circumstances where there is ‘no sensible reason for such an inordinate risk of severe harm to be presented.’” *Hoffner*, 492 Mich at 462, quoting *Lugo*, 464 Mich at 519 n. 2. “We have recognized,” this Court has observed on the other hand, “that neither a common condition nor an avoidable condition is uniquely dangerous.” *Id.* at 463. This Court has further explained that:

In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a “special aspect” and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition a priori, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm.

Lugo, 464 Mich at 519 n. 2.

The year after *Lugo* was decided, this Court ruled in *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, that the sloped roof of a building under construction that was covered in ice and snow was not “uniquely dangerous” and therefore did not have special aspects as a matter of law. 466 Mich 11, 19-20; 643 NW2d 212 (2002). In *Perkoviq*, the plaintiff worked for a subcontractor that was hired to paint the upper level exterior of a house under construction. *Id.* at 12-13. The plaintiff suffered severe injuries when he fell from the unprotected roof approximately twenty feet to the ground, and alleged it was because the defendant, who was the property owner and general contractor, did not ensure that there was a fall

protection system. *Id.* After finding the conditions of the roof to be open and obvious, this Court explained that, “[t]he fact that defendant may have additional duties in its role as general contractor... does not alter the nature of the duties owed by virtue of its ownership of the premises. As owner, it had no reason to foresee that the condition of the premises would be unreasonably dangerous, as the roof lacked any special aspects that would make it so.” *Perkoviq*, 466 Mich at 19 (internal footnote omitted). “To avoid summary disposition on this type of claim, a plaintiff must present evidence of ‘special aspects’ of the condition that differentiate it from the typical sloped rooftop containing ice, snow, or frost.” *Id.* at 20. Thus, *Perkoviq* makes clear that the risk of working on an icy sloped roof is insufficient to satisfy the narrow special aspects exception to the open and obvious doctrine.

In its opinion reversing the trial court’s finding that the flat dry roof from which Velez fell did not have special aspects, the Court of Appeals majority relied on a statement from *Perkoviq* that:

In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site. There were no special aspects of this condition that made the open and obvious risk unreasonably dangerous.

Perkoviq, 466 Mich at 18. The panel majority inferred that a landowner’s knowledge that an invitee is likely to take inadequate safety precautions would render a condition “unreasonably dangerous for purposes of a premises-liability claim.” See Appx. 7a, Majority Opinion at p. 4 n. 3. But this is contrary to this Court’s holding in *Mann*, that “special aspects are not defined with regard to whether a premises possessor should expect that an invitee will not discover the danger or will not protect against it, but rather by whether an otherwise open and obvious danger... imposes an unreasonably high risk of severe harm to an invitee.” *Mann*, 470 Mich at 331-332 (internal citations and quotation marks omitted). As discussed, *Mann* went so far as to hold that even where the landowner caused the invitee to be unable to protect him or herself from the condition, that is not relevant to the question of whether the condition itself had special aspects. *Id.* at 330-331. Under *Mann*, whether or not Shafer knew or should have known about Gill and Velez’s safety

precautions unequivocally has no bearing on the issue of whether the ordinary roof was unreasonably dangerous, which, under *Perkoviq*, it patently was not.

So what, then, did the *Perkoviq* decision intend to convey by discussing the defendant's knowledge of the plaintiff's safety measures? See *Perkoviq*, 466 Mich at 18. Presumably, the Court meant that there were no special aspects of the condition itself that prevented invitees from taking adequate safety precautions. In other words, had there been special aspects of the roof that prevented the painter and other workers from using appropriate fall protection, then the roof could have been deemed unreasonably dangerous, from which danger the defendant may have had a duty to protect the plaintiff. In fact, however, the *Perkoviq* Court noted, "[t]here were no special aspects of this condition that made the open and obvious risk unreasonably dangerous" by preventing the painter from taking adequate safety precautions. *Id.* As the Court continued, the defendant "had no reason to foresee that the condition of the premises would be unreasonably dangerous, as the roof lacked any special aspects that would make it so." *Id.* at 19. Indeed, the Court concluded, "Plaintiff has not articulated any action that could reasonably be expected of possessors of land in Michigan to protect against the obvious dangers that arise when snow, ice, or frost accumulate on sloped rooftops. To avoid summary disposition on this type of claim, a plaintiff must present evidence of "special aspects" of the condition that differentiate it from the typical sloped rooftop containing ice, snow, or frost." *Id.* at 19-20. Likewise in this case, there was no evidence of any special aspects of the roof itself that prevented Gill or Velez from taking safety precautions.

The Court of Appeals majority, however, misread *Perkoviq* and incorrectly concluded that Shafer's purported knowledge that Velez would not use adequate fall protection, on a roof without any special aspects, "renders [the] roofing job unreasonably dangerous for purposes of a premises liability claim." See Appx. 7a, Majority Opinion at p. 4 n 3. This is contrary to *Mann*, clearly erroneous, and will cause substantial injustice to Shafer. It also creates a broad new duty on the part of property owners to protect contractors and other invitees from their own conduct. As this Court stated in *Perkoviq*, "[t]he fact that

defendant may have additional duties in its role as general contractor... does not alter the nature of the duties owed by virtue of its ownership of the premises.” *Perkoviq*, 466 Mich at 19. Thus, the duty created by the Majority Opinion seemingly would not be limited in its application to only general contractors who own property. Rather, this new duty would extend to any residential homeowner who is having a new roof put on his or her house who looks up and sees that the roofing crew is not using safety equipment. “[A]bsent reasonable warnings or other remedial measures being taken,” the homeowner will be exposed to liability in the event a roofer is injured, due to the fact that the homeowner maintained an unreasonably dangerous condition, i.e., an ordinary roof, on the property. See *Lugo*, 464 Mich at 518. But like this Court rightly noted in *Perkoviq*, 466 Mich 11, 20, what “action... could reasonably be expected of possessors of land in Michigan to protect against the obvious dangers” of roofers working on an ordinary roof? Rather, the Majority Opinion conflicts with precedent and is bad public policy.

Because the icy sloped roof in *Perkoviq* did not have special aspects as a matter of law, neither did the flat dry roof in this case on which Velez failed to protect himself. As the roofing subcontractor Larry Gill testified:

Q: *Was there anything unusual about this roofing project or was this pretty much something you had seen couple hundred times before?*

A: *No, there was nothing.*

Q: *And you would expect it's something that Joe [Velez] had seen 60, 80 times before at least?*

A: *Yes.*

* * *

Q: *Does it surprise you that he fell?*

A: *Yes.*

Q: *Why?*

A: *You usually don't fall off a flat roof, especially when you're supposed to be the safety guy. [See Appx. 25a ,27a, Gill Deposition at pp. 10, 14.]*

Leave to appeal should be granted accordingly.

B. Leave to appeal is also warranted under MCR 7.305(B)(5) because the Majority Opinion, which held there was a question of fact as to Shafer's knowledge, is clearly erroneous and will cause material injustice.

Once the Court of Appeals majority found (incorrectly) that a landowner's knowledge that an invitee will not adequately protect him or herself renders an open and obvious condition per se unreasonably dangerous, it proceeded to review the record evidence and find "multiple indications in the record that defendants knew or had reason to know that Gill would fail to employ safety precautions." See Appx. 7a, Majority Opinion at p. 4. As the Dissenting Opinion correctly expressed, however, the majority relied on "a quantum leap of logic, piling inference upon supposition upon speculation" to find a question of fact on the issue of Shafer's knowledge. See Appx. 12a-13a, Dissenting Opinion at pp. 1-2.

First, the majority noted Gill's testimony that "there was not anything unusual about the roofing job at issue, allowing for the inference that Gill did not typically provide fall protection for his day laborers." See Appx. 7a, Majority Opinion at p. 4. Even assuming this was a plausible inference, it is complete speculation to assume that Shafer knew or should have known about the safety measures Gill "typically" provided. The panel majority pointed out that Gill had previously performed roofing work for Shafer, but the majority at the same time acknowledged that "the record is... [un]developed" on the issue of "whether Gill used appropriate safety measures during the prior jobs for defendants and what defendants knew of those measures." See Appx. 7a, Majority Opinion at p. 4. This "[un]developed" record, which Moore had every opportunity to develop on these issues, was insufficient to create a question of fact.

Second, the majority also focused on a conversation between Gill and representatives of Shafer immediately after the accident, and stated that "there was no indication that the Shafers were surprised to learn that Gill failed to take required safety precautions. A reasonable inference is that defendants knew or

had reason to know that Gill was not using fall protection.” See Appx. 7a-8a, Majority Opinion at pp. 4-5 (internal footnote omitted). It is not clear, however, why the majority assumed that Shafer “learn[ed] that Gill failed to take required safety precautions” during that conversation, such that Shafer should have been “surprised.” The majority cited only the following testimony given by Richard Shafer’s son Raymond about the conversation with Gill: “Q: Anything else discussed at that time? A: Speculation of what happened. Q: And who speculated? Larry, your dad, you, all of you, none of you? A: How do you fall off a roof? That’s what was speculated. A roofer doesn’t fall off a roof.” See Appx. 7a, Majority Opinion at p. 4 n. 4. “The lack of safety precautions,” the majority continued, “is an obvious answer to Raymond’s question about how a roofer would fall from a roof,” and the fact that Gill apparently did not give that answer “indicates that the lack of safety measures was presumed” by Shafer. See Appx. 8a, Majority Opinion at p. 5 n. 4. But this too is complete speculation. In fact, there is no hint in the record as to why Gill did not mention his alleged lack of safety precautions during the discussion with Shafer, but there are some frankly more plausible explanations than that it “was presumed” by Shafer. It seems likely, for example, that Gill was not prepared at that time to admit that he may have been negligent. After all, he did not carry liability insurance. See Appx. 28a, Gill Deposition at p. 30. Perhaps, alternatively, Gill did not know at that time that the applicable safety standards may have required more fall protection than having a “holler man” and he therefore did not think the particular safety measures used worth noting. “I do not know,” the Dissenting Opinion wrote, and “neither does the majority nor would a jury.” See Appx. 13a, Dissenting Opinion at p. 2. Rather, the Majority Opinion relied on an improper “quantum leap of logic, piling inference upon supposition upon speculation” in order to create a question of fact as to whether Shafer knew that Gill would use allegedly inadequate safety measures. See Appx. 13a, Dissenting Opinion at p. 2. As a matter of law, Shafer had no such knowledge or reason to know.

Finally, the majority also inferred from the fact that Gill was paid less than an “established” roofing contractor that Shafer knew that Gill was “more likely to forego the time and expense required to implement

fall protection.” See Appx. 8a, Majority Opinion at p. 5. “This,” the dissent pointed out, is “yet another quantum leap of logic.” See Appx. 13a, Dissenting Opinion at p. 2. “[T]he majority simply points to no evidence to establish exactly what defendants knew regarding how Gill was able to charge less than other contractors.” See Appx. 13a, Dissenting Opinion at p. 2. In fact, the fall protection Gill actually used – having Velez serve as the holler man – may have cost Gill just as much if not more money, i.e., Velez’s wages, than the methods Gill testified he in retrospect would have used, including a simple “safety barricade” or “safety flags,” or working on smaller areas of the roof at a time. See Appx. 29a, Gill Deposition at p. 31. Moore marshaled no evidence as to the cost of the safety measures that Gill testified in retrospect would have been appropriate. Accordingly, there was no evidence from which to conclude that Gill’s billing rates informed or should have informed Shafer about the type of fall protection Gill might use.

In *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 7-8; 890 NW2d 344 (2016), quoting *Maiden*, 461 Mich at 121, this Court affirmed the rule that it is a plaintiff’s burden to establish his or her claims in order to survive a motion for summary disposition: “[A] litigant’s mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.” . The issue in *Lowrey* was whether the defendant bar had actual or constructive knowledge of standing water on a staircase. *Id.* at 9-11. The plaintiff testified that an employee of the bar had been standing at the bottom of the stairs and witnessed her fall. *Id.* at 11. She also testified that her pants were wet after her fall. *Id.* at 12. This Court held that these facts were insufficient to give rise to an inference that the defendant had actual knowledge of water on the stairs or that the hazard was of such a character that a reasonable premises possessor would have discovered it. *Id.* at 11-12. The same conclusion is warranted here.

It is not a reasonable inference – but rather a “leap of logic” – to conclude from Gill’s testimony that there was nothing unusual about the roofing job, from the fact that following the accident Gill did not tell

Shafer about the safety measures he had used, and from the fact that Gill's rates were lower than an "established" contractor, that Shafer therefore knew or should have known that Velez would use allegedly inadequate fall protection. Rather, Moore failed to create a question of fact as to whether Shafer had actual or constructive knowledge. Accordingly, even if Shafer's knowledge theoretically would have rendered the roof per se unreasonably dangerous (it would not, as discussed above), Shafer had no such knowledge as a matter of law. Leave to appeal should be granted for this reason as well.

C. Leave to appeal is also warranted under MCR 7.305(B)(5) because the Majority Opinion, which assumed that "appropriate safety precautions would have prevented" Velez's fall, is clearly erroneous and will cause material injustice.

Even assuming *arguendo* that a landowner's knowledge that an invitee will not take adequate safety precautions did render an open and obvious condition unreasonably dangerous (it does not), and even assuming there was a question of fact as to whether Shafer knew that Gill would take allegedly inadequate safety precautions (there is not), the Majority Opinion relied on impermissible speculation to assume there was something Shafer could have done to prevent Velez's fall.

As this Court noted in *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004), "[p]roximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." Like any other tort plaintiff, Moore had to prove "cause in fact" by "reasonable inference," and not by "speculation" and "impermissible conjecture." See *Pontiac School District v Miller Canfield Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997). Quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the *Pontiac School* court stated:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [Pontiac School, 221 Mich App at 615; citations omitted.]

Here, Moore's claims against Shafer were premised on a *res ipsa loquitur* theory: Velez fell off a roof, so Shafer must be responsible. There was not a shred of evidence, however, as to why he actually fell. Velez himself is unable to give testimony. Gill testified that he did not see Velez fall, he does not know how Velez fell, and nobody to his knowledge has any idea how Velez fell. See Appx. 27a, Gill Deposition at p. 14. Nor were there any other witnesses to the fall. In fact, despite extensive discovery, there was absolutely no evidence whatsoever as to what caused Velez's fall. But without any evidence of why he fell, it is pure speculation to assume there was anything Shafer could have done to prevent the fall. The Court of Appeals attempted to address this issue and posited that, "[R]egardless of what caused the fall, appropriate safety precautions would have prevented it. Thus, the term 'fall protection.'" See Appx. 8a, Majority Opinion at p. 5 n. 5. With all due respect, that conclusory statement rings hollow. Perhaps, for example, Velez jumped from the roof, in which case the fact that the safety measures are called "fall protection" seemingly would not have helped prevent the fall. Moreover, even assuming that Shafer had complied with its alleged duty to protect Velez by, for example, warning Gill to use "appropriate safety precautions" (Shafer had no such duty), there is no indication in the record that Gill would have even heeded such a warning. Rather, because Moore relied on impermissible speculation to establish the causation element of her claims, i.e., that there was anything Shafer could have done to avoid the accident, leave to appeal should be granted.

IV. STATEMENT OF RELIEF SOUGHT

For the reasons stated above, Shafer respectfully requests that this Court grant leave to appeal the Court of Appeals' January 30, 2020 decision reversing the Circuit Court's grant of Shafer's motion for summary disposition. Alternatively, Shafer asks the Court to enter an order pursuant to MCR 7.305(H)(1) peremptorily reversing the Court of Appeals decision and reinstating the trial court's decision.

Respectfully submitted,

MADDIN HAUSER ROTH & HELLER, P.C.

/s/ Richard M. Mitchell

Richard M. Mitchell (P45257)

Jesse L. Roth (P78814)

Attorneys for Appellants Richard Shafer, Karen Shafer, R
Shafer Builders, Richard N. Shafer as Trustee and Karen
J. Shafer as Trustee

28400 Northwestern Highway, 2nd Floor

Southfield, MI 48034

(248) 827-1875

rmitchell@maddinhauser.com

jroth@maddinhauser.com

Dated: March 11, 2020

PROOF OF SERVICE

I hereby certify that on the 11th day of March, 2020, the Application of Appellants Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and Karen J Shafer as Trustee from the Decision of the Michigan Court of Appeals and this Proof of Service were electronically filed using the MiFile and service system of the Michigan Supreme Court which will serve counsel of record.

I further certify that on the 11th day of March, 2020, I served the Michigan Court of Appeals with a Notice of Filing of the Application for Leave to Appeal and Proof of Service using the MiFile and serve system of the Michigan Court of Appeals which will serve counsel of record.

I further certify that on the 11th day of March, 2020, I served the Macomb County Circuit Court with a Notice of Filing of the Application for Leave to Appeal and Proof of Service using the MiFile and serve system of the Macomb County Circuit Court which will serve counsel of record.

/s/ Richard M. Mitchell

Richard M. Mitchell (P45257)

**STATE OF MICHIGAN
IN THE SUPREME COURT**

SUSAN MOORE, as Guardian and
Conservator of the ESTATE OF
JOSEPH DANIEL VELEZ, JR, an
Incapacitated Individual,

SC: _____

Plaintiff-Appellee,

COA No. 345101

v.

Macomb CC: 17-002389-NO

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89

Defendants-Appellants,

and

HENSLEY MFG, INC., a Michigan corporation,

Defendant.

APPELLANTS' APPENDIX OF EXHIBITS TO

**APPELLANTS RICHARD SHAFER, KAREN SHAFER, R SHAFER BUILDERS, RICHARD N. SHAFER
AS TRUSTEE AND KAREN J. SHAFER AS TRUSTEE'S BRIEF IN SUPPORT OF APPLICATION FOR
LEAVE TO APPEAL FROM DECISION OF THE MICHIGAN COURT OF APPEALS**

ORAL ARGUMENT REQUESTED

Richard M. Mitchell (P45257)
Jesse L. Roth (P78814)
MADDIN HAUSER ROTH & HELLER, P.C.
Attorneys for Defendants-Appellants
28400 Northwestern Highway
Southfield, MI 48034
(248) 827-1875
rmitchell@maddinhauser.com
jroth@maddinhauser.com

TABLE OF CONTENTS

Exhibit 1	1/20/2020 Majority Opinion	3a
Exhibit 2	1/30/2020 Dissenting Opinion	11a
Exhibit 3	Deposition of Raymond Shafer 11/27/2017.....	15a
Exhibit 4	Deposition of Lawrence Gill 4/13/2018.....	19a
Exhibit 5	Photograph of roof.	30a
Exhibit 6	Complaint.....	32a
Exhibit 7	Defendants' Motion for Summary Disposition.	41a
Exhibit 8	Plaintiff's Response to Defendants' Motion for Summary Disposition	60a
Exhibit 9	Defendants' Reply Brief to Plaintiff's Response to Defendants' Motion for Summary Disposition	81a
Exhibit 10	Motion for Summary Disposition Hearing Transcript 6/4/2018	88a
Exhibit 11	6/6/2018 Opinion and Order Granting Defendants' Motion for Summary Disposition.....	107a
Exhibit 12	Plaintiff's Motion for Reconsideration	117a
Exhibit 13	Defendants' Response to Plaintiff's Motion for Reconsideration	126a
Exhibit 14	Motion for Reconsideration Hearing Transcript 8/6/2018	138a
Exhibit 15	8/10/2018 Opinion and Order Denying Plaintiff's Motion for Reconsideration.....	151a

Exhibit 1 - 1/20/2020 Majority Opinion

Exhibit 1

Exhibit 1 - 1/20/2020 Majority Opinion

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

**STATE OF MICHIGAN
COURT OF APPEALS**

ESTATE OF JOSEPH DANIEL VELEZ, JR., by
Guardian/Conservator SUSAN MOORE,

UNPUBLISHED
January 30, 2020

Plaintiff-Appellant,

v

No. 345101
Macomb Circuit Court
LC No. 2017-002389-NO

RICHARD SHAFER, KAREN SHAFER, R.
SHAFER BUILDERS, REVOCABLE LIVING
TRUST AGREEMENT DATED 12/14/89, by
trustees RICHARD N. SHAFER and KAREN J.
SHAFER,

Defendants-Appellees,

and

HENSLEY MANUFACTURING, INC.,

Defendant.

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Joseph Daniel Velez, Jr., suffered incapacitating injuries when he fell off of a building while performing roofing work. His estate ("plaintiff") appeals the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of the Shafer defendants (collectively "defendants"). For the reasons stated in this opinion, we affirm the grant of summary disposition regarding plaintiff's claim under the common work area doctrine, but reverse the court's ruling that plaintiff failed to establish a question of fact on its claim of premises liability.

Exhibit 1 - 1/20/2020 Majority Opinion

I. BACKGROUND

Velez was part of a crew of workers assigned to install a water-proof membrane over the recently installed roof of an addition to a building owned by defendants Richard and Karen Shafer.¹ The building was located in an industrial park owned by the Shafers. Richard's own construction company, defendant R. Shafer Builders, was the general contractor on the building project. Shafer Builders performed much of the work on the project using its own employees. Relevant to this appeal, Shafer employees erected the steel roofing supports and roof decking; after the roof decking was complete, the employees installed the roof's block wall insulation.

Shafer Builders hired an individual, Larry Gill, to install the roofing membrane. Gill hired several day laborers, including Velez, on a cash basis to provide labor to do the installation. There was no written contract between Gill and defendants. Moreover, Gill was not a licensed contractor, and he did not have employees, a business organization, or a safety program for the workers he "hired." Also, he did not carry either workers compensation insurance or general liability insurance. Before hiring Gill for this job, defendants did not inquire whether he carried insurance.

The roofing installation occurred over the course of two days, August 20 and 24, 2016. On August 24, 2016, Velez fell from the 20-foot roof and suffered catastrophic injuries, leaving him severely disabled and legally incompetent. At the time Velez fell, there were no safety or fall-protection devices in place on the roof. Gill testified that no Shafer employee or representative was present at the work site, but testimony establishes that numerous Shafer agents were nearby at the industrial park while Gill and his crew were working.

Plaintiff brought suit in June 2017, asserting claims for premises liability and common work area liability. After discovery was completed, defendants moved for summary disposition under MCR 2.116(C)(10). In June 2018, the trial court issued a written opinion and order granting defendants' motion. Regarding the premises-liability claim, the trial court found no genuine issue of material fact that the condition of the roof was open and obvious and that defendants had no reason to foresee that Gill would fail to take necessary precautions to guard against the "danger of being on a roof." With respect to the common work area doctrine, the court concluded that plaintiff failed to establish a question of fact as to whether the danger created a high degree of risk to a significant number of workmen in a common area. The court denied plaintiff's motion for reconsideration and its motion to amend the complaint to add a claim of "active negligence" against defendants.

¹ The building was leased to defendant Hensley Manufacturing, Inc., who was granted summary disposition.

Exhibit 1 - 1/20/2020 Majority Opinion

II. ANALYSIS

A. PREMISES LIABILITY

Plaintiff first argues that the trial court erred in granting defendants, in their capacity as owners of the building, summary disposition of the premises-liability claim. We agree.²

There is no dispute that Velez was on defendants' premises as an invitee, i.e., a person "who enter[ed] the premises at the owner's express or implied invitation to conduct business concerning the owner[.]" *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). "[A] landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). "However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). But if there are "special aspects" that make an open and obvious condition unreasonably dangerous, a landowner "has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).

The trial court found that summary disposition of the premises-liability claim was required by *Perkoviq v Delcor Home-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2012). In that case, the plaintiff was "working on the roof of a home under construction when he slipped on ice or frost that had formed on the roof, falling approximately twenty feet to the ground and suffering serious injuries." The defendant was both the owner and general contractor of the property. *Id.* at 12. Applying the open and obvious danger doctrine, the Supreme Court held that the defendant, as an owner, was entitled to summary disposition of the premises-liability claim. *Id.* at 18. The Court reasoned as follows:

In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions

² We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Cichewicz v Salesin*, 306 Mich App 14, 21; 854 NW2d 901 (2014). "A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When addressing a motion for summary disposition brought under subrule (C)(10), the court must examine all documentary evidence presented to it, and drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Dextrom v Wexford Co*, 287 Mich App 406, 430; 789 NW2d 211 (2010).

Exhibit 1 - 1/20/2020 Majority Opinion

of the construction site. There were no special aspects of this condition that made the open and obvious risk unreasonably dangerous. [*Id.* at 18.³]

Plaintiff argues that this case is distinguishable from *Perkoviq* because there is a question of fact whether defendants had reason to anticipate that Gill would not take appropriate safety measures. Viewing the evidence in a light most favorable to plaintiff, we agree.

Defendants note that Gill was an experienced roofer who had provided satisfactory work for them in the past. It is highly relevant whether Gill used appropriate safety measures during the prior jobs for defendants and what defendants knew of those measures. Unfortunately, the record is not as developed on those matters as one would hope. That said, there are multiple indications in the record that defendants knew or had reason to know that Gill would fail to employ safety precautions. Gill testified that there was not anything unusual about the roofing job at issue, allowing for the inference that Gill did not typically provide fall protection for his day laborers. The record also indicates that when Richard, Gill, and Richard's son Raymond Shafer met to discuss the accident shortly after it happened, there was no indication that the Shafers were surprised to learn that Gill failed to take required safety precautions.⁴ A reasonable

³ The dissent focuses on *Perkoviq's* language that the roof was not unreasonably dangerous but ignores that the Court also repeatedly stated that the owner had no reason to know that appropriate precautions would be not be taken. See *Perkoviq*, 466 Mich at 18-19. Although not expressly stated, *Perkoviq* indicates that the lack of safety precautions, and the owner's knowledge thereof, renders a roofing job unreasonably dangerous for purposes of a premises-liability claim. In any event, the Court's statements regarding the foreseeability of necessary precautions were clearly necessary to its resolution of the case and not mere dicta. Accordingly, they constitute binding precedent. See *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13, 21 n 15; 857 NW2d 520 (2014).

⁴ In relevant part, Raymond provided the following testimony about that conversation:

Q. Anything else discussed at that time?

A. Speculation of what happened.

Q. And who speculated? Larry, your dad, you, all of you, none of you?

A. How do you fall off a roof? That's what was speculated. A roofer doesn't fall off a roof.

Q. Okay. Anything else that sticks out in your mind about the conversation?

A. His shoe being 50 feet away. Was there a bee. I don't know. I don't know. Speculation. Disgust.

Q. Anything else stick out in your mind about the conversation?

A. No.

Exhibit 1 - 1/20/2020 Majority Opinion

inference is that defendants knew or had reason to know that Gill was not using fall protection. Moreover, there was evidence that defendants were paying Gill substantially less than what an “established” roofing contractor would charge. This indicates that Gill had less costs and requirements than other roofers, and was therefore more likely to forego the time and expense required to implement fall protection.

In sum, Gill was hired to finish a roofing project that was largely completed by defendants. Defendants chose Gill in part because he cost substantially less than established, i.e., licensed and insured, roofers. Defendants worked with Gill multiple times in the past, although the record is silent regarding his use of safety precautions for those jobs. However, Gill’s testimony was that there was nothing unusual about his work in this case. It could be inferred from Raymond’s testimony that defendants presumed that safety measures were not being used, or were not surprised to learn that fact. Further, the work was being done on defendants’ property over the course of two days with several of their agents and employees on the surrounding premises. While the jury may ultimately agree with the dissent’s view of the case, we conclude that reasonable minds could find that defendants knew or had reason to know that Gill would not take necessary safety precautions while installing the roofing membrane. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (“A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”). Accordingly, the trial court erred in granting defendants summary disposition of the plaintiff’s claim of premises liability.⁵ See *Perkoviq*, 466 Mich at 18-19.

B. COMMON WORK AREA

Next, plaintiff contends that the trial court erred when it granted summary disposition to defendants, in their capacity as general contractor, of plaintiff’s claim under the common work area doctrine. We disagree.

“At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees.” *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004). In *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982), the Supreme Court created an exception to this rule called the common work area doctrine. A claim of negligence under the doctrine requires the plaintiff to prove:

The lack of safety precautions is an obvious answer to Raymond’s question about how a roofer would fall from a roof. Yet his summary of the post-fall discussion indicates that the lack of safety measures was presumed, and that the “[d]isgust” was focused on Velez.

⁵ As an alternative ground for affirmance, defendants argue that they are entitled to summary disposition because plaintiff does not know what caused Velez to fall off the roof. However, regardless of what caused the fall, appropriate safety protections would have prevented it. Thus the term “fall protection.”

Exhibit 1 - 1/20/2020 Majority Opinion

(1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Ormsby*, 471 Mich at 57.]

A plaintiff's failure to establish any one of these four elements is fatal to a *Funk* claim. *Id.* at 59 n 11.

Plaintiff argues that the trial court erred in concluding that there were not a significant number of workers subjected to working at heights without fall protection. The common work area doctrine applies "where employees of a number of subcontractors were all subject to the same risk or hazard." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997). *Hughes* advised that four workers was an insufficient amount to constitute a significant number. *Id.* at 8-9. The Supreme Court has held that "two to six employees of one subcontractor" was not a significant amount of workers. *Alderman v JC Dev Communities, LLC*, 486 Mich 906, 906 (2010).

Here, the record evidence indicates that Gill's roofing crew numbered seven people including Gill and plaintiff. Plaintiff identified defendants' employees that installed the decking and insulation on the roof of the building, but those workers do not count because they were not employees of subcontractors. Further, as will be discussed below, the record indicates that those employees used fall protection. There is some evidence that a plumber performed work on or near the roof. But plaintiff was not able to identify the plumber, the day the plumber worked, or whether the plumber used fall protection. Thus, plaintiff failed to present evidence that the plumber was subjected to the same hazard as Gill's workers. Accordingly, plaintiff did not establish a genuine issue of material fact with regard to the third element of the common work area doctrine because seven workers of one subcontractor does not amount to a significant number for purposes of the common work area doctrine. See *Alderman*, 486 Mich at 906.

C. NEGLIGENCE

Finally, plaintiff contends that the trial court erred when it denied her request for leave to amend the complaint to add a claim of active negligence against defendants in their capacity as general contractor. Because the proposed amendment was futile, we affirm the trial court.⁶

When a trial court grants a motion for summary disposition under MCR 2.116(C)(10), it "must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324

⁶ We review for an abuse of discretion a trial court's decision whether to grant leave to amend a complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

Exhibit 1 - 1/20/2020 Majority Opinion

Mich App 182, 209; 920 NW2d 148 (2018) (quotation marks and citation omitted), An amendment to a pleading “is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim.” *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

“It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages.” *Fultz v Union-Commerce Associates*, 470 Mich 460, 463, 683 NW2d 587 (2004). The common law “imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.” *Heaton v Benton v Harbor Co*, 286 Mich App 528, 536; 780 NW2d 618 (2009) (quotation marks and citation omitted).

Plaintiff claims that defendants were actively negligent when they removed a fall protection anchor point from the roof. Plaintiff relies on evidence that employees of Shafer Builders installed and then removed the anchor point that they were using while installing the roof decking after they had completed their portion of the work. Defendants counter that the removal of the anchor point does not support a claim of negligence because it did not create a new hazard. We agree with defendants.

There may be instances where a general contractor performs its part of the work negligently, thereby endangering subsequent subcontractors. But, here, defendants only removed the safety measures that they were using. So plaintiff’s proposed negligence claim amounts to an assertion that defendants were responsible for providing fall protection for Gill and his workers. However, “each subcontractor is generally held responsible for the safe operation of its part of the work,” and a general contractor only has the responsibility to provide job safety for subcontractors if the common area work doctrine is applicable. See *Hughes*, 227 Mich App at 8-9. As discussed, plaintiff’s claim of a common work area fails as a matter of law. Thus, the proposed amended complaint seeking to hold defendants liable for not providing fall protection to Gill and his workers was futile. For that reason, we affirm the trial court.⁷

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Douglas B. Shapiro

⁷ The trial court based its ruling on the conclusion that the motion was procedurally deficient, but we may affirm the trial court when it reaches the right result for the wrong reason. *Gleason v Dep’t of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Exhibit 2 - 1/30/2020 Dissenting Opinion

Exhibit 2

Exhibit 2 - 1/30/2020 Dissenting Opinion

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

**STATE OF MICHIGAN
COURT OF APPEALS**

ESTATE OF JOSEPH DANIEL VELEZ, JR., by
Guardian/Conservator SUSAN MOORE,

UNPUBLISHED
January 30, 2020

Plaintiff-Appellant,

v

No. 345101
Macomb Circuit Court
LC No. 2017-002389-NO

RICHARD SHAFER, KAREN SHAFER, R.
SHAFER BUILDERS, REVOCABLE LIVING
TRUST AGREEMENT DATED 12/14/89, by
trustees RICHARD N. SHAFER and KAREN J.
SHAFER,

Defendants-Appellees,

and

HENSLEY MANUFACTURING, INC.,

Defendant.

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

SAWYER, J. (*concurring in part and dissenting in part*).

While I agree with the majority in affirming the trial court's grant of summary disposition on the issue of common work area and in denying leave to amend the complaint to add a claim of active negligence, I respectfully dissent from the majority's conclusion that the trial court erred in granting summary disposition on the premises liability claim.

Initially, the majority declares it "highly relevant whether Gill used appropriate safety measures during the prior jobs for defendants and what defendants knew of those measures." *Ante, slip op* at 6. But the majority then acknowledges that "the record is not as developed on those matters as one would hope." *Id.*

Exhibit 2 - 1/30/2020 Dissenting Opinion

The majority argues that a reasonable juror could conclude that defendants had reason to know that Gill would not take appropriate safety precautions from their reaction, or lack of reaction, in a meeting after the accident. The majority refers to a meeting between representatives of defendants and Gill shortly after the accident. The majority states that “there was no indication that the Shafers were surprised to learn that Gill failed to take required safety precautions.” *Ante, slip op* at 7. According to the majority, a “reasonable inference is that defendants knew or had reason to know that Gill was not using fall protection.” *Id.* This is quite a quantum leap of logic, piling inference upon supposition upon speculation. We have no way of knowing why the Shafers reacted, or did not react, as they did. Perhaps they are merely the consummate professionals who keep their emotions in check during a business meeting. I do not know. But, more to the point, neither does the majority nor would a jury.

If this were not enough speculation, the majority ventures even further and offers the suggestion that Gill was paid substantially less than an “established” roofing contractor¹ and that this “indicates that defendants knew that Gill had less costs and requirements than other roofers, such as a safety program, and was therefore more likely to forego the time and expense required to implement fall protection.”² *Id.* Not only is this yet another quantum leap of logic, the majority also fails to point to any requirement that a commercial roofing contractor be licensed.³ But even assuming that a commercial roofing contractor must be licensed and that the roofing contractor, Gill, lacked such a license, the majority fails to support its syllogism that it provides a conclusion as to the landowner knowing the likelihood of appropriate safety practices being met. The majority simply points to no evidence to establish exactly what defendants knew regarding how Gill was able to charge less than other contractors. Indeed, the majority again acknowledges that “the record is silent regarding [Gill’s] use of safety precautions for those (prior) jobs.” *Id.* at 8. If the record is silent as to what prior safety precautions were, or were not, used, then it must also be silent as to defendant’s knowledge of those prior precautions, or lack thereof.

Ultimately, the majority’s analysis is an ill-fated effort to distinguish this case from *Perkoviq v Delcor Home-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2012). In that case, the plaintiff was employed by a subcontractor and was working on the roof of a new house that was under construction. The plaintiff brought a claim for premises liability against the defendant, who was both landowner and general contractor, after the plaintiff fell off the roof and suffered serious injuries. The plaintiff was working as a painter and had been instructed to paint the upper level exterior of the house. *Id.* at 12-13. His particular job that November day was to climb up onto the roofs of three homes and paint the upper levels of their exteriors. *Id.* at

¹ The majority defines “established” as being licensed and insured roofers.” *Id.* at 8.

² The majority overlooks the fact that plaintiff’s decedent was the fall protection. His job was to be the so-called “holler man.” That is, it was his responsibility to keep an eye on the workers and to warn them when they got too close to the edge.

³ A residential builder must be licensed. MCL 339.601(6). But I am unaware of any requirement that a commercial roofer must be licensed.

Exhibit 2 - 1/30/2020 Dissenting Opinion

13. He was working on the sloped roof of one of those homes when he slipped on ice and fell approximately 20 feet to the ground below. *Id.* The *Perkoviq* Court held that summary disposition was warranted in favor of the defendant because the plaintiff presented no evidence that the condition of the roof, although open and obvious, was “unreasonably dangerous.” *Id.* at 19-20. The Court also found that slippery conditions encountered by construction workers as a necessary part of their work did not constitute an effectively unavoidable hazard, because the open and obvious danger could have been avoided through the use of precautions by the workers. *Id.*

Here, Velez was working on a flat, dry roof on a summer day and fell 20 feet. Velez was an experienced roofer and was in fact acting as the roofing crew’s “holler man” that day, meaning he was “to let the two people that [were] working on the edge [of the roof] know where they’re at;” his only job was to act as a human safety system for the other two crew members who were installing flashing. Similar to *Perkoviq*, I conclude that summary disposition is warranted in favor of defendants because plaintiff has presented no evidence that the condition of the flat, dry roof, although open and obvious, was “unreasonably dangerous.” *Perkoviq*, at 19-20.

Ultimately, I find the majority’s arguments to be irrelevant to the analysis. Contrary to plaintiff’s assertions, the record establishes that Gill had worked with defendants in the past and had completed roofing jobs satisfactorily. Plaintiff has not established that the risk of harm was foreseeable under the circumstances present in this case because the bottom line is that the open and obvious danger could have been avoided through the use of precautions by Velez. *Perkoviq*, at 19-20. For these reasons, the trial court properly granted summary disposition to defendants on plaintiff’s premises liability claim.

I would affirm.

/s/ David H. Sawyer

Exhibit 3

In The Matter Of:

Susan Moore v. Richard Shafer

Raymond Shafer

November 27, 2017

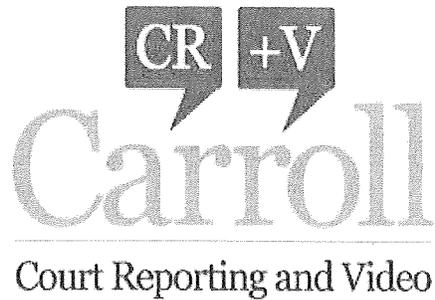


Exhibit 3 - Deposition of Raymond Shafer 11/27/2017

Raymond Shafer
November 27, 2017

Page 10

- 1 Q. All right. I'm just wondering, is there a Romeo
2 Industrial Park Number 1 somewhere?
- 3 A. That would be East Pond. So yes, that would make
4 sense. East Pond, Shafer Drive, McLean Drive. One,
5 two, three.
- 6 Q. Got you. So there are actually basically three --
- 7 A. Phases, if you will.
- 8 Q. Okay. Describe for me how the industrial parks were
9 developed. If I understand it, this is property that
10 was owned in the family?
- 11 A. Yes.
- 12 Q. And the parcels were developed sequentially, one, two,
13 three?
- 14 A. Yes, sir.
- 15 Q. Your father, his name?
- 16 A. Richard Shafer.
- 17 Q. Was he primarily the person involved in the
18 development of the industrial parks?
- 19 A. Yes.
- 20 Q. Anyone else in the family involved in the business?
- 21 A. No.
- 22 Q. I also note again we're in an office that has a sign
23 R. Shafer Builder; that would be just his initial, R?
- 24 A. Correct.
- 25 Q. And if I understand that, that's a proprietorship or a

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586-468-2411

Exhibit 3 - Deposition of Raymond Shafer 11/27/2017

Raymond Shafer
November 27, 2017

Page 15

1 Q. Okay. Again, all of them would basically be hourly
2 kind of people, doing manual kind of work --

3 A. Yes.

4 Q. -- back in August?

5 A. Yes.

6 Q. Any other employees of R. Shafer Builder back at that
7 time?

8 A. No.

9 Q. Who kind of figured out the idea to develop these
10 properties as industrial parks? Was that your father?

11 A. Yes.

12 Q. And if I understand it, how long have you been working
13 with or for your father?

14 A. Since '86.

15 Q. Your father made a career of developing property,
16 running business here in the Romeo area?

17 A. Yes.

18 Q. Are you familiar with any of his promotional efforts
19 to advertise or get business?

20 A. No.

21 Q. Do you know whether he listed himself in any
22 directories or on the internet, anything like that, as
23 an experienced builder?

24 A. No.

25 Q. Do you know whether he had a website or anything of

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586-468-2411

Exhibit 4

In the Matter Of:

SUSAN MOORE vs RICHARD SHAFER

17-2389-NO

LAWRENCE GILL

April 13, 2018



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
6

1 about roofing and what the tools are, tools of your
2 trade.

3 Q. And when did you undergo that training?

4 A. I don't remember the dates. I retired about three
5 years ago, and it was 30 years before that, and it
6 goes over a three-year period.

7 Q. Do you remember some of the things they taught you
8 about safety?

9 A. Yeah. They go through it, like I worked for LeDuc
10 Roofing and Sheet Metal all 30 years that I was there,
11 and we even have classes, they take you back to
12 classes, refresher courses and things like that.

13 MR. FISHBACK: Real quick, just time-wise,
14 if you retired three years ago, would that have been
15 2015?

16 THE WITNESS: Yeah.

17 MR. FISHBACK: And so 30 years before would
18 be '85?

19 THE WITNESS: Yeah. I think I started in
20 '84.

21 MR. FISHBACK: I didn't mean to interrupt.

22 MR. MITCHELL: No problem.

23 BY MR. MITCHELL:

24 Q. Actually, LeDuc Roofing, is that where you met Mr.
25 Velez?



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
7

- 1 A. Yes.
- 2 Q. How long did you work with him at LeDuc?
- 3 A. I believe around 14, 15 years.
- 4 Q. And when you were at LeDuc, what was your job?
- 5 A. I started out, you start out as an apprentice and you
- 6 work your way up through six stages, and then that's
- 7 with your schooling, and then you graduate from the
- 8 schooling and that's when you become a journeyman.
- 9 Q. How long were you an apprentice? Test your memory.
- 10 A. Till '91 is when I became a journeyman.
- 11 Q. When you say work your way through the six stages,
- 12 tell us for the record what that means.
- 13 A. There's four month classes, and there's stage one,
- 14 which is the beginning, basically you're learning
- 15 about your tools and how things work; and then the
- 16 second stage takes you to different things which I
- 17 don't remember; and then the third stage, fourth
- 18 stage, fifth stage, sixth stage. Some of it gets you
- 19 into hot tar, some of it gets you into like rubber
- 20 roofing and things like that. They show you the
- 21 different things and they teach you how to do curbs
- 22 and stuff like that, air conditioner units, things
- 23 like that, specialty things.
- 24 Q. So if you worked with Joe Velez for 14 years or so,
- 25 that would put him starting there around 2000, 2001?



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
8

- 1 A. Around 2000, around there.
- 2 Q. Did he start as an apprentice?
- 3 A. Yes, he did.
- 4 Q. And do you have knowledge of him working his way
5 through the six stages and becoming a journeyman?
- 6 A. No, I don't.
- 7 Q. What did he do at LeDuc?
- 8 A. He was a, for me, he was an apprentice, and as you're
9 working at LeDuc Roofing, there's different foremen,
10 so sometimes they push you off to different people as
11 they need different kind of help. Like he's an
12 apprentice, or if I needed guys that were more
13 skilled, the journeymen, they'd trade people around
14 and things like that. It wasn't like you worked with
15 him every day. He wasn't on your crew the whole time.
- 16 Q. But he certainly wasn't as apprentice that whole time?
- 17 A. No. I'm sure as he went through, he wasn't.
- 18 Q. You just don't personally know?
- 19 A. I just don't personally know.
- 20 Q. When you worked with him at LeDuc, did you work on
21 commercial roofing projects that were similar to the
22 one at Shafer?
- 23 A. Yes.
- 24 Q. So tell me how you came to work on this job at
25 Hensley. When I'm talking about this job, you know



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
9

1 what I'm talking about, the incident that brings us
2 here. How did it come to pass that you were working
3 on that?

4 A. I do repairs for Mr. Shafer or R Shafer Builder, I do
5 repairs for him. He called me and he said he was
6 going to build a new building -- not a new building
7 but an add on, another section of the building, and
8 told me to get ready to make a schedule to roof it
9 when he was ready for me.

10 Q. You say Mr. Shafer, was that Ray or Richard?

11 A. Richard.

12 Q. Do you remember about when he called you and told you
13 this?

14 A. No, I don't.

15 Q. Were you familiar with this building before Richard
16 Shafer called you?

17 A. No.

18 Q. But you had done other roofing projects for Mr.
19 Shafer?

20 A. Yes.

21 Q. And you did other roofing projects for other people
22 too?

23 A. Yes.

24 Q. You were not an employee of R Shafer Builders?

25 A. No.



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
10

- 1 Q. You worked for whoever you worked for, right?
- 2 A. Yes, sir.
- 3 Q. You never got a W-2 from R Shafer?
- 4 A. No.
- 5 Q. In the 30 plus years you had been doing this, now 32
- 6 or so, how many of these types of roofs have you
- 7 worked on? Give me just a rough ballpark. I'm going
- 8 to guess it's a pretty big number?
- 9 A. Probably pretty good number. Maybe 200.
- 10 Q. And to your actual knowledge, how many of these types
- 11 of roofs had Joe Velez worked on before this one?
- 12 A. I don't know.
- 13 Q. How many had he worked on with you?
- 14 A. Probably 60, 80. I don't know exact number.
- 15 Q. So you were both pretty experienced at doing this?
- 16 A. Yes.
- 17 Q. Was there anything unusual about this roofing project
- 18 or was this pretty much something you had seen couple
- 19 hundred times before?
- 20 A. No, there was nothing.
- 21 Q. And you would expect it's something that Joe had seen
- 22 60, 80 times before at least?
- 23 A. Yes.
- 24 Q. What exactly were you to do? What were you hired to
- 25 do?



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
11

- 1 A. I was hired to install a new roof on Mr. Shafer's add
2 on addition to Hensley.
- 3 Q. What did that entail?
- 4 A. Ordering the material and then installing a roof
5 system.
- 6 Q. Now, the day that you were out there -- you were out
7 there one day or two?
- 8 A. Two days.
- 9 Q. And who was with you?
- 10 MR. FISHBACK: Which day?
- 11 MR. MITCHELL: Well, that's a good point.
- 12 BY MR. MITCHELL:
- 13 Q. Was it the same people both days?
- 14 A. I had more people on the first day. I think I had two
15 or three people when I installed the roof itself.
- 16 Q. But it was the second day that Joe fell?
- 17 A. Yes.
- 18 Q. Do you know if it was two or three?
- 19 A. Probably three probably three more people. So
20 probably seven of us all together.
- 21 Q. Probably but you're not sure?
- 22 A. I don't really remember, but I'm pretty sure it was
23 probably seven of us.
- 24 Q. But that was the first day?
- 25 A. Correct.



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
14

- 1 A. Yeah, just making sure that they're safe.
- 2 Q. And if they get close, then --
- 3 A. He was supposed to let them know.
- 4 Q. There was no place really to tie off on that roof, was
- 5 there?
- 6 A. No, sir.
- 7 Q. That is not unusual, is it?
- 8 A. No, especially on new builds.
- 9 Q. Do you know how Joe fell?
- 10 A. No.
- 11 Q. Have you ever talked to anybody that has told you they
- 12 have any idea how Joe fell?
- 13 A. No.
- 14 Q. Does it surprise you that he fell?
- 15 A. Yes.
- 16 Q. Why?
- 17 A. You usually don't fall off a flat roof, especially
- 18 when you're supposed to be the safety guy.
- 19 Q. How did you come to realize that he had fallen?
- 20 A. A couple people had yelled from the ground.
- 21 Q. Do you know how long he had been down there?
- 22 A. No.
- 23 Q. Now, as I understand it, there's a lower part and an
- 24 upper part of that roof?
- 25 A. Yes, sir.



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
30

- 1 A. No.
- 2 Q. If people worked for you, they weren't covered by
3 unemployment insurance or frankly any insurance of any
4 kind as far as you know?
- 5 A. No.
- 6 Q. The men that worked for you, then if I understand it,
7 were basically day laborers, you would pay them a
8 daily rate of some amount of money without any kind of
9 deductions or anything like that?
- 10 A. Yes.
- 11 Q. And do you recall what that was? If I understand it,
12 you had a day rate for journeymen and a day rate for
13 helpers, do you know approximately what that was?
- 14 A. 150 for helpers, 250 for journeymen.
- 15 Q. And they would basically be paid directly by you with
16 either cash or a straight check without deductions?
- 17 A. Yes, sir.
- 18 Q. When Mr. Shafer called you, did he tell you what he
19 wanted?
- 20 A. Not at that time.
- 21 Q. How did things proceed from that?
- 22 A. Usually when we got ready to do the job, they would
23 call me and say that everything was ready for me to
24 come roof the job, and he had to have -- this is what
25 he wanted, was two-inch ISO insulation and the better



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Exhibit 4 - Deposition of Lawrence Gill 4/13/2018

LAWRENCE GILL
SUSAN MOORE vs RICHARD SHAFER

April 13, 2018
31

1 membrane, which was 060 membrane, and basically that
2 was it, and the metal, he would say what color metal
3 he wanted on the side of his building.

4 Q. So basically, then, after that initial phone call,
5 there would be another contact, if you will, where he
6 told you specifically what type of insulation and what
7 type of roofing, what kind of flashing, all of that,
8 he would tell you that's what he wanted?

9 A. Yes.

10 Q. And at some point, would you give him an estimate or
11 tell him this is how much it's going to run?

12 A. When we originally talked, because he had told me he
13 was going to build a couple of buildings, and I
14 roughly told him usually the materials and everything
15 and your labor would run around 300 dollars a square.

16 Q. And a square is 10 x 10?

17 A. 10 x 10.

18 Q. Hundred square feet?

19 A. Correct.

20 Q. And do you recall the size of this particular
21 addition?

22 A. 84 x 60, I believe.

23 Q. Actually, we have an exhibit, and I think that that's
24 accurate, so that's a little over 5,000 square feet?

25 A. Yes.



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Exhibit 5 - Photograph of Roof

Exhibit 5

Exhibit 5 - Photograph of Roof

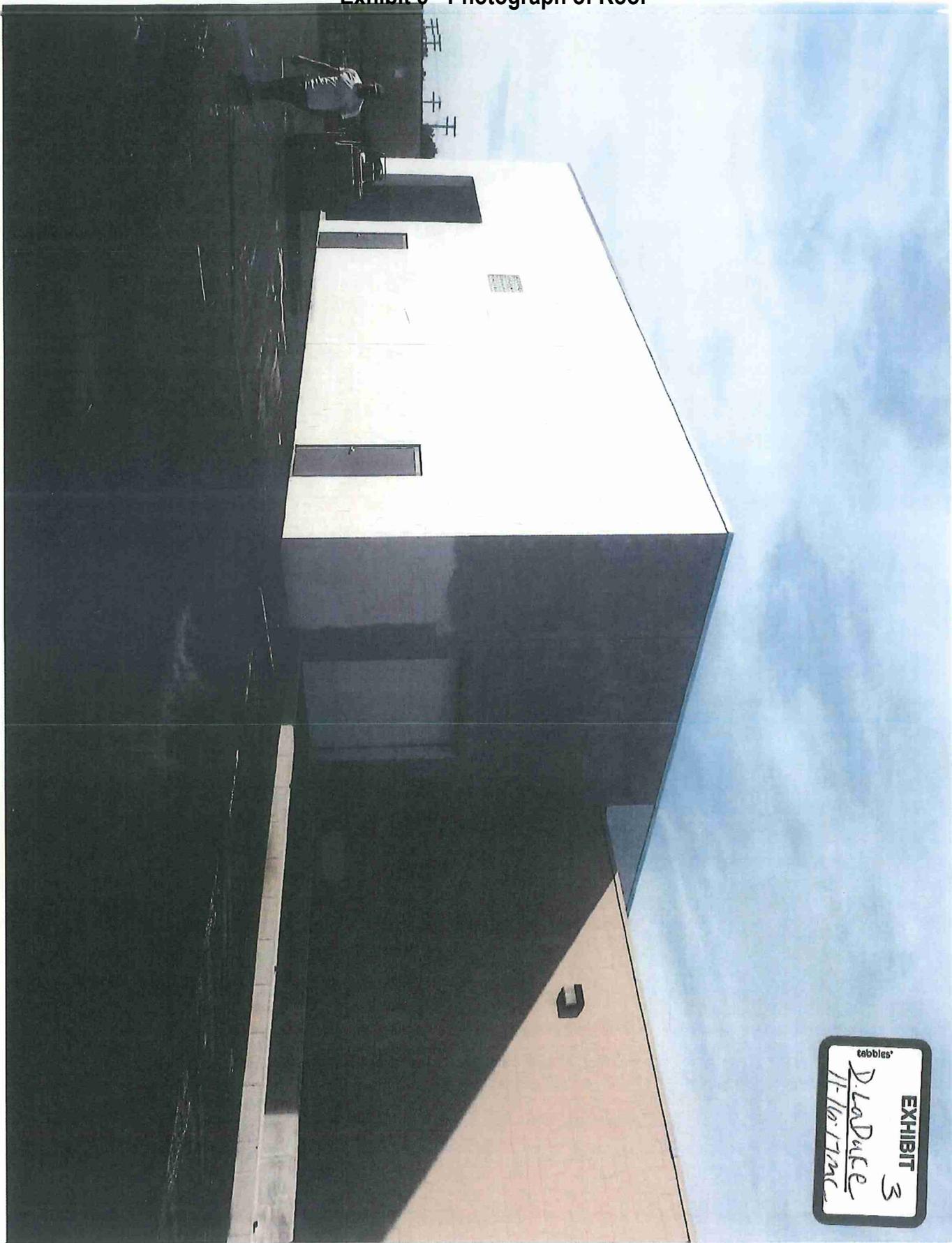


Exhibit 6 - Complaint

Exhibit 6

Exhibit 6 - Complaint

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR,
an Incapacitated Individual,

17 - 2389 - NO
Case No.: 2017- -NO
Hon.

JOSEPH TOIA

Plaintiff,

vs

RICHARD SHAFER, KAREN SHAFER,
R SHAFER BUILDERS, RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement
dated 12/14/89; KAREN J. SHAFER, Trustee of
Revocable Living Trust Agreement dated 12/14/89;
HENSLEY MFG., INC., a Michigan
Corporation,

Defendants

GEORGE T. FISHBACK (P29763)
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207
(313) 965-3464
(313) 965-4315 - FAX
gtfishback@sachswaldman.com

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JUN 14 2017

KAREN A. SPRANGER
MACOMB COUNTY CLERK

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action between these parties, arising out of the same transaction or occurrence as alleged in this Complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this Court.



GEORGE T. FISHBACK P29763

COMPLAINT

Exhibit 6 - Complaint

NOW COMES Plaintiff SUSAN MOORE, GUARDIAN and CONSERVATOR of the ESTATE OF JOSEPH DANIEL VELEZ, JR, an Incapacitated Individual, by and through her attorneys, SACHS WALDMAN Professional Corporation, and respectfully represents unto this Honorable Court as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Susan Moore, is the duly appointed and qualified Guardian and Conservator of the Estate of Joseph Daniel Velez, Jr., an Incapacitated Individual, who resides in the City of Olivet, Eaton County, Michigan.
2. Defendants Richard Shafer and Karen Shafer, are husband and wife and reside in the Village of Romeo, Macomb County, Michigan.
3. Defendant R Shafer Builder is a Macomb County Sole Proprietorship owned, operated and managed by Defendant Richard Shafer with its principal place of business in the Village of Romeo, Macomb County, Michigan.
4. Defendant Richard N. Shafer, is a Trustee under Revocable Living Trust Agreement dated December 14th, 1989.
5. Defendant Karen J. Shafer is a Trustee under Revocable Living Trust Agreement dated December 14th, 1989.
6. Defendant Hensley Mfg., Inc., is a Michigan corporation authorized to do business in Michigan with its principal place of business in the Village of Romeo, Macomb County, Michigan.
7. Plaintiff's ward, Joseph Velez's injury occurred at 151 Shafer Drive, Romeo, Macomb County, Michigan (hereinafter "the premises")
8. The amount in controversy exceeds \$25,000.

Exhibit 6 - Complaint

9. Jurisdiction and Venue are proper in this Court.

FACTS

10. Plaintiff re-alleges and reincorporates paragraphs 1-9 as if fully stated herein.

11. At all relevant times Defendants Richard and Karen Shafer and/or Richard N. Shafer, Trustee under Revocable Living Trust Agreement dated December 14, 1989, and Karen J. Shafer, Trustee under Revocable Living Trust Agreement dated December 14, 1989 owned the premises involved herein.

12. That prior to August 24, 2016 Defendants Richard Shafer and Karen Shafer and/or R Shafer Builder developed and owned numerous industrial buildings on Lots 19 through 36 along Shafer Drive in Romeo, identified as Shafer Industrial Park No. 2, including the premises involved herein for the express purpose of leasing the buildings or custom building the facilities to suit the needs of their customers.

13. That Defendant R Shafer Builder held itself out to the public as an experienced and competent developer, builder, construction manager and/or general contractor specializing in custom building facilities to suit the needs of its customers.

14. That prior to August 24, 2016 Defendant Richard Shafer and/or R Shafer Builder were issued numerous building permits by the Village of Romeo, including the building permit issued on August 9, 2016, regarding a construction project involving the premises, to achieve their express purpose of leasing the buildings in Shafer Industrial Park No. 2 or custom building the facilities to suit the needs of their customers.

15. At all relevant times, Defendant Hensley Mfg., Inc., was the lessee and possessor of the premises located at 151 Shafer Drive, Romeo, MI 48065.

Exhibit 6 - Complaint

16. On August 24, 2016, Defendant Richard Shafer and/or R Shafer Builders was the developer, general contractor and/or construction manager for a construction project on the premises and that Defendant retained and exercised control over all aspects of the project, including the means and methods of the work performed.

17. On August 24, 2016, Defendant Richard Shafer and/or R Shafer Builders hired Larry Gill to perform certain roofing work on the premises.

18. On August 24, 2016, Larry Gill hired Plaintiff's ward, Joseph Velez to perform roofing labor at the behest of Defendants Richard Shafer and/or R Shafer Builders, including the installation of a new roof system and repair flashing on the roof of the premises.

19. On August 24, 2016, Plaintiff was working without fall protection to install flashing on an unprotected edge of a high roof of the premises when he fell approximately 25 feet to the ground.

20. As a result of the incident, Plaintiff suffered a fractured skull, facial fractures, multiple brain bleeds and swollen brain, fractured left humerus, fractured left elbow and fractured left femur and other incapacitating injuries, as hereinafter more fully set forth.

COUNT I

21. Plaintiff re-alleges and reincorporates paragraphs 1-20 as if fully stated herein.

22. On August 24, 2016, Plaintiff's ward was a business invitee on the premises owned by Richard Shafer and Karen Shafer and/or Richard N. Shafer, Trustee under Revocable Living Trust Agreement dated December 14th, 1989, and Karen J. Shafer, Trustee under Revocable Living Trust Agreement dated December 14th, 1989 (Hereinafter

Exhibit 6 - Complaint

the "Owners") and leased by Defendant Hensley Mfg., Inc. (Hereinafter the " Lessee").

23. The Defendant Owners and Lessee owed a duty to a business invitee such as Plaintiff's ward:

- a) To provide a reasonably safe premises.
- b) To protect and/or warn of any dangers of which they knew or should have known.
- c) To inspect the premises for latent dangers.
- d) To prepare the premises and make them safe for the invitee's reception.
- e) To install or require the installation of guardrail systems, safety net systems, personal fall arrest systems, warning line systems or any combination thereof required by applicable safety standards, regulations and/or recommended practices.
- f) To install or require the installation of anchorage points for lanyards and other devices that reduce the possibility of the worker falling off the high roof and becoming injured or killed.
- g) To perform or require the performance of an accident prevention plan, safety plan and/or safety monitoring program for all persons on the premises.
- h) To require all contractors and/or subcontractors to comply with all applicable safety standards, regulations and/or recommended practices, including, but not limited to MIOSHA 408.4011 and 408.44502.

24. The Defendant Owners and Lessee negligently breached their stated duties by failing to perform them in a reasonably carefull manner.

25. That as a direct and proximate result of the aforementioned incident proximately caused by the negligence of the Defendants, Plaintiff sustained permanent, painful and severe injuries, great physical pain and mental anguish, extreme shock to the

Exhibit 6 - Complaint

nervous systems, including but not limited to a fractured skull, facial fractures, multiple brain bleeds and swollen brain, fractured left humerus, fractured left elbow and fractured left femur and other incapacitating injuries.

26. That as a direct and proximate result of these injuries, Plaintiff has become liable for and required to expend large sums of money for the receipt of hospital and medical care and treatment and will be required to do so in the future; has been rendered disabled and unable to attend to his usual and ordinary affairs and will remain so in the future; has suffered a loss of earnings and a loss and impairment of his earning capacity and ability to work and will remain so in the future; has suffered great physical pain and mental anguish and will so suffer in the future.

WHEREFORE, Plaintiff respectfully asks that this honorable court enter judgment in his favor in an amount found to be just and reasonable, together with interest, cost and attorney fees.

COUNT II

27. Plaintiff re-alleges and reincorporates paragraphs 1-26 as if fully stated herein.

28. As the designer, developer, general contractor and/or construction manager, Defendant Richard Shafer d/b/a R Shafer Builder had a duty:

- a) To exercise control over all aspects of it's construction project to insure that all work was performed in a reasonably safe manner.
- b) To take reasonable steps within its supervisory and coordinating authority to guard against readily observable and avoidable dangers that created a high degree of risk to a significant number of workmen, including Plaintiff, in a common work area.

Exhibit 6 - Complaint

- c) To provide or require the provision of a training program for each employee, and Plaintiff in particular, who might be exposed to fall hazards.
- d) To develop, maintain, and coordinate with employees an accident prevention or safety program or to require all contractors and/or subcontractors to do the same.
- e) To require all contractors and/or subcontractors to comply with all applicable safety standards, regulations and/or recommended practices, including, but not limited to MIOSHA 408.4011 and 408.44502.

35. Defendant Richard Shafer d/b/a R Shafer Builder negligently breached its stated duties by failing to perform them in a reasonably careful manner.

36. That as a direct and proximate result of the aforementioned incident proximately caused by the negligence of the Defendants, Plaintiff sustained permanent, painful and severe injuries, great physical pain and mental anguish, extreme shock to the nervous systems, including but not limited to a fractured skull, facial fractures, multiple brainbleeds and swollen brain, fractured left humerus, fractured left elbow and fractured left femur and other incapacitating injuries.

37. That as a direct and proximate result of these injuries, Plaintiff has become liable for and required to expend large sums of money for the receipt of hospital and medical care and treatment and will be required to do so in the future; has been rendered disabled and unable to attend to his usual and ordinary affairs and will remain so in the future; has suffered a loss of earnings and a loss and impairment of his earning capacity and ability to work and will remain so in the future; has suffered great physical pain and mental anguish and will so suffer in the future.

WHEREFORE, Plaintiff Susan Moore, Guardian and Conservator of the Estate of Joseph Daniel Velez, Jr., an Incapacitated Individual, demands judgment against the

Exhibit 6 - Complaint

Defendants in whatever amount to which she is found to be entitled, together with costs, interest and attorneys' fees.

Respectfully submitted,

SACHS WALDMAN, Professional Corporation,

BY:



GEORGE T. FISHBACK (P29763)

Attorney for Plaintiff

2211 East Jefferson Avenue

Suite #200

Detroit, Michigan 48207-4160

313/965-3464

gtfishback@sachswaldman.com

Dated: June 13, 2017

Exhibit 7

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR., an
Incapacitated individual,

Plaintiff,

V

Case No. 17-2389-NO
Hon. Richard L. Caretti

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89; HENSLEY
MFG, INC., a Michigan corporation,

Defendants.

SACHS WALDMAN, P.C.
By: George T. Fishback (P29763)
2211 East Jefferson Avenue, Suite 200
Detroit, Michigan 48207
(313) 965-3464 / (313) 965-4315 fax
gtfishback@sachswaldman.com
Attorneys for Plaintiff

MADDIN, HAUSER, ROTH & HELLER, P.C.
By: Richard M. Mitchell (P45257)
Jesse L. Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhauser.com
*Attorneys for Defendants Richard Shafer, Karen
Shafer, R Shafer Builders, Richard N. Shafer and
Karen J. Shafer*

PLUNKETT COONEY
By: David R. Stechow (P56052)
150 W. Jefferson Avenue, Suite 800
Detroit, MI 48226
(248) 901-4007 / (248) 901-4040 (fax)
dstechow@plunkettcooney.com
Attorneys for Defendant Hensley Mfg

SHAFER DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendants, Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and
Karen J. Shafer as Trustee, by and through their attorneys, Maddin, Hauser, Roth & Heller, P.C., pursuant

Exhibit 7 - Defendants' Motion for Summary Disposition

to MCR 2.116(C)(10), move for summary disposition as to all claims against them brought by Plaintiff for the reasons stated in their Brief in Support. Concurrence in the relief requested in this motion has been sought and denied.

WHEREFORE, Defendants, Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and Karen J. Shafer as Trustee, respectfully request that this Honorable Court grant this Motion and dismiss Plaintiff's Complaint as against them in its entirety.

Respectfully submitted,

MADDIN, HAUSER, ROTH & HELLER, P.C.

By: /s/ Richard M. Mitchell
Richard M. Mitchell (P45257)
Jesse L. Roth (P7814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhauser.com
Attorneys for Shafer Defendants

DATED: April 30, 2018

Exhibit 7 - Defendants' Motion for Summary Disposition

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSPEH DANIEL VELEZ, JR., an
Incapacitated individual,

Plaintiff,

V

Case No. 17-2389-NO
Hon. Richard L. Caretti

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89; HENSLEY
MFG, INC., a Michigan corporation,

Defendants.

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By: George T. Fishback (P29763)
2211 East Jefferson Avenue, Suite 200
Detroit, Michigan 48207
(313) 965-3464 / (313) 965-4315 fax
gtfishback@sachswaldman.com
Attorneys for Plaintiff

MADDIN, HAUSER, ROTH & HELLER, P.C.
By: Richard M. Mitchell (P45257)
Jesse L. Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhauser.com
*Attorneys for Defendants Richard Shafer, Karen
Shafer, R Shafer Builders, Richard N. Shafer and
Karen J. Shafer*

PLUNKETT COONEY
By: David R. Stechow (P56052)
150 W. Jefferson Avenue, Suite 800
Detroit, MI 48226
(248) 901-4007 / (248) 901-4040 (fax)
dstechow@plunkettcooney.com
Attorneys for Defendant Hensley Mfg

BRIEF IN SUPPORT OF SHAFER DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Exhibit 7 - Defendants' Motion for Summary Disposition

This case arises out of an accident that occurred on a small construction project, when a roofing subcontractor's worker fell off the edge of a flat roof that was being installed on a commercial building. The issue is whether Plaintiff can establish any claims against the landowner in view of Michigan law that a landowner or general contractor cannot be held liable for injuries suffered by a subcontractor's worker. While there are two exceptions to this general rule, one exception only applies to large construction sites, which is not this case, and the other exception does not apply where the danger is open and obvious. Because there can be no genuine dispute that these exceptions do not apply to the instant matter, Plaintiff's claims fail as a matter of law. Furthermore, despite extensive discovery, plaintiff has been unable to establish the causation of this incident, instead relying completely on unsupported speculation.

STATEMENT OF FACTS

The late Richard Shafer was a landowner and industrial developer in Romeo, Michigan. See Deposition of Ray Shafer (attached hereto as **Exhibit A**) at pp 10, 15. The accident giving rise to this litigation occurred on industrial property owned by Shafer and his wife's trusts. The property has been leased by Hensley Manufacturing, which designs and manufactures automotive products, for approximately 15 years. See Deposition of Dennis LaDuke (attached hereto as **Exhibit B**) at pp 8; Ray Shafer Dep. at p 17.

In early 2016, Hensley asked Shafer to build an addition onto its building. See Deposition of Kelly Estrada (attached hereto as **Exhibit C**) at pp 9-10. Shafer obtained a building permit on August 9, 2016, and construction began shortly thereafter. See Building Permit (attached hereto as **Exhibit D**). Shafer performed the excavation work himself. See Deposition of Mark Allison (attached hereto as **Exhibit E**) at pp 9-10. Shafer's workers then dug and poured the foundation. See Allison Dep. at pp 10-11. Next, they erected the steel trusses and laid metal decking at the top of the structure. See Allison Dep. at pp 12-20. Shafer's workers have testified that, when they were working near the top of the structure, they used fall protection equipment, specifically a harness and safety rope. See Allison Dep. at p 20; Deposition of

Exhibit 7 - Defendants' Motion for Summary Disposition

Thomas Shafer (attached hereto as **Exhibit F**) at p 14; Deposition of Elmo Madden (attached hereto as **Exhibit G**) at pp 26, 29. After the decking was complete, the workers poured insulation into the structure. See Madden Dep. at p 27. After completing all of this work with Shafer's own team of construction workers, the next step was to install the roof onto the addition. See Madden Dep. at p 31-32. Shafer hired an independent roofing subcontractor named Larry Gill to perform the roofing work. See Deposition of Larry Gill (attached hereto as **Exhibit H**) at pp 8 – 11.

Mr. Gill is an extremely experienced roofer, having trained and begun working in the field in 1984. See Gill Dep. at p 6. He obtained the status of journeyman roofer in 1991. See Gill Dep. at p 7. Mr. Gill testified that in his career, he has worked on approximately 200 roofing jobs that were similar to the job at issue. See Gill Dep. at p 10. He testified that he first began working on roofing with Plaintiff's ward, Joseph Daniel Velez, Jr., in the year 2000, since which time they have worked on approximately 60 to 80 roofing jobs together. See Gill Dep. at pp 6 – 10. Mr. Gill testified that there was nothing unusual about the roofing job at issue; it was just like all of the other jobs on which he has worked with Mr. Velez. See Gill Dep. at p 10. See also photograph, **Exhibit I**).

Mr. Gill testified that he completed the roofing job at issue in two days. See Gill Dep. at p 11. On the first day, August 23, 2016, Mr. Gill had five roofers working along with him to perform the work. See Gill Dep. at p 39. The next day, Mr. Gill only needed three of those workers to complete the job. See Gill Dep. at p 41. Mr. Velez's job on the team was to serve as the "holler man," in which role he was responsible to alert co-workers when they were getting close to the edge of the roof. See Gill Dep. at p 31. Consequently, there were only four people working on the site when this incident occurred.

It was on the second day of the job when Mr. Velez, who again was an experienced roofer who had worked with Gill for over 15 years, fell from the roof. See Gill Dep. at pp 7 – 8, 11. Mr. Gill testified that he did not see Mr. Velez fall, he does not know how Mr. Velez fell, and nobody to his knowledge has any idea how Mr. Velez fell. See Gill Dep. at p 14. Plaintiff cannot testify as to what happened. In fact, despite

Exhibit 7 - Defendants' Motion for Summary Disposition

extensive discovery, there has been absolutely no evidence whatsoever as to what caused plaintiff's fall. There was nothing unusual on the roof. There were no objects left there by the defendants or anyone else. In fact, plaintiff's co-workers did not even immediately realize he had fallen. The cause of his fall is absolute speculation. It is anybody's guess.

Mr. Gill further testified that it surprised him that Mr. Velez fell, because "You usually don't fall off a flat roof, especially when you're supposed to be the safety guy." See Gill Dep. at p 14. Because Mr. Gill had apparently let his insurance lapse, Mr. Velez's personal representative has brought this action against the Shafer Defendants and Hensley.

ARGUMENT

This case features two theories of liability against the Shafer Defendants for the injuries suffered by their roofing subcontractor's worker: premises liability, and Michigan's common work area doctrine. Because falling from a roof is an open and obvious danger, and because Plaintiff cannot establish the necessary elements of her common work area theory, it cannot be disputed that all of the claims against the Shafer Defendants fail as a matter of law.

A. **Applicable Summary Disposition Standards.**

A motion under MCR 2.116 (C) (10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. In reviewing the documentary evidence, the court must draw all reasonable inferences in the non-moving party's favor. *Smith v Globe Life Ins Co*, 460 Mich 446, 454, 597 NW2d 28 (1999). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 119-120. In order to meet his evidentiary burden in opposing a motion for summary disposition, a plaintiff "must present more than conjecture and speculation." *Karbel v Comerica Bank*, 247 Mich App 90, 97, 635 NW2d 69 (2001). It is not sufficient for a plaintiff to promise to offer factual support

Exhibit 7 - Defendants' Motion for Summary Disposition

for his claims at trial. *Globe Life Ins Co*, 460 Mich at 455 n 2. Under 2.116 (C) (10), a plaintiff must present evidentiary proofs creating a genuine issue of material fact for trial. *Id.*

- B. Plaintiff cannot establish any exception to the general rule that a landowner or general contractor is not liable for injuries to a subcontractor's worker.

"It has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes," including for injuries suffered by the contractor's workers. *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004). This rule applies both to landowners who hire independent contractors and to general contractors who hire subcontractors. *Ghaffari v Turner Constr Co*, 473 Mich 16, 20-21; 699 NW2d 687, (2005). Rather, it is the independent contractor or subcontractor who is responsible for its own workers' safety. *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008); *Hughes v PMG Building, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997) (in Michigan, as a matter of public policy, subcontractors on a job site have a duty to ensure the site is safe for their workers). While exceptions to this general rule of non-liability do exist – and Plaintiff pleads certain of them in her Complaint in an attempt to state a cause of action against the Shafer Defendants – none of the exceptions apply in this case.

1. The danger of falling from a roof is open and obvious, and Plaintiff has failed to establish any "special aspects" that save her premises liability claim.

In Count I of her Complaint, Plaintiff asserts premises liability claims against the Shafer Defendants on the basis of their ownership of the property where Mr. Velez fell from the roof. This is one exception to the no-liability rule: a landowner retains a duty to exercise reasonable care to protect a business invitee, such as Velez, from an unreasonable risk of harm caused by a dangerous condition on the land *that the owner knows or should know the invitee will not discover, realize or protect himself against*. *Perkoviq v Delcor Home-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002). It is well established, however, that *the owner is not required to protect an invitee from open and obvious dangers*, for which there can be no tort liability. *Id.* at 18. "Whether a danger is open and obvious depends upon whether it is

Exhibit 7 - Defendants' Motion for Summary Disposition

reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 681 (1997). That the danger of falling off the edge of a flat roof is open and obvious is mandated not only by common sense but by binding Michigan Supreme Court precedent.

As the roofing subcontractor Larry Gill testified:

Q: Was there anything unusual about this roofing project or was this pretty much something you had seen couple hundred times before?

A: No, there was nothing.

Q: And you would expect it's something that Joe had seen 60, 80 times before at least?

A: Yes.

* * *

Q: Does it surprise you that he fell?

A: Yes.

Q: Why?

A: You usually don't fall off a flat roof, especially when you're supposed to be the safety guy. [See Gill Dep. at pp 10, 14.]

In *Perkoviq*, the plaintiff worked for a subcontractor that painted homes in a housing development. While working on the roof of a partially constructed home, he slipped and fell twenty feet to the ground. He brought a premises liability claim against the general contractor, and the Supreme Court unanimously affirmed the lower court's holding that falling from a roof is an open and obvious danger that bars any recovery. *Id.* at 18. See also *Hughes*, 277 Mich App at 11 (the danger of falling off a roof "clearly" is open and obvious).

Plaintiff may try to argue that the "special aspects" exception to the open and obvious doctrine somehow applies in this case, to avoid summary disposition. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). But any such argument would be baseless. The Supreme Court has

Exhibit 7 - Defendants' Motion for Summary Disposition

explained that the "special aspects" exception "for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm." *Hoffner v Lanctoe*, 492 Mich 450, 468; 821 NW2d 88 (2012). According to the *Hoffner* Court:

The touchstone of the "special aspects" analysis is that the condition must be characterized by its *unreasonable risk of harm*. Thus, an "unreasonably dangerous" hazard must be just that—not just a dangerous hazard, but one that is unreasonably so. And it must be more than theoretically or retrospectively dangerous. Similarly, an "effectively unavoidable" condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances. In this case, the fact that plaintiff, a business invitee, had a contractual *right* to enter the premises does not mean that she was *unavoidably compelled* to confront the... condition. [*Id.* at 455-456 (emphasis in original).]

Thus, the Supreme Court in *Perkoviq* unanimously held that the risk of falling from a roof was, as a matter of law, not unavoidable even though the plaintiff was compelled to confront the hazard as a requirement of his work in the construction business. See *Hoffner*, 492 Mich at 471-472 (citing *Perkoviq*, 466 Mich at 11). The *Perkoviq* Court also explained that the risk of falling from an *icy* roof was, as a matter of law, not unreasonably dangerous: "The mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition." *Perkoviq*, 466 Mich at 19-20. The same is *a fortiori* true here, where Mr. Velez fell off the edge of a flat roof on "an average summer day." See Gill Dep. at p 42.

As a matter of Michigan Supreme Court precedent, Mr. Velez's fall was an open and obvious risk, and Plaintiff cannot establish that the harm was unavoidable or unreasonably dangerous. It was a flat roof with no hidden dangers whatsoever. It was exactly the kind of roof plaintiff had worked on numerous times over the years. Plaintiff's premises liability claims must be dismissed, accordingly.

2. As a matter of law, Plaintiff has failed to establish the elements of Michigan's common work area exception.

Count II of Plaintiff's Complaint implicates Michigan's "common work area" doctrine, which applies to injuries to subcontractors and their workers. See *Funk v General Motors Co*, 392 Mich 91, 104; 220

Exhibit 7 - Defendants' Motion for Summary Disposition

NW2d 641 (1974), abrogated on other grounds by *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982). Ordinarily, "[t]he immediate employer of a construction worker... is immediately responsible for job safety." *Id.* at 102. In cases "involving very large construction sites," however, the common work area exception may apply to trigger responsibility on the part of the general contractor or property owner. *Smith v BREA Property Management of Michigan LLC*, 490 Fed Appx 682, 684 (CA 6, 2012) (citing *Funk*, 392 Mich at 110). The policy supporting this exception is that on large construction sites, many different subcontractors may be exposed to the same hazard, and the entity in the best position to implement and coordinate job safety is the general contractor or property owner. *Smith*, 490 Fed Appx at 684 (citing *Funk*, 392 Mich at 110).

Under the common work area exception, a general contractor or property owner can be vicariously liable for the negligence of the worker's immediate employer, so long as "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004). To establish the liability of a general contractor or property owner under this doctrine, a plaintiff must prove all four elements. *Id.* at 60. As a matter of law, Plaintiff has failed to establish two of the four elements.

- a. The injury did not occur in a "common work area," because there were not multiple subcontractors exposed to the same risk.

To establish the fourth element – that the hazard was located "in a common work area" – the plaintiff must demonstrate that the same danger was posed to multiple subcontractors. *Id.* at 57 fn 9 (citing *Hughes*, 227 Mich App at 8-9). Plaintiff, however, has failed to marshal any evidence that any subcontractor other than the roofing subcontractor Larry Gill and his workers was exposed to the danger of working on a roof without an adequate fall protection system.

Exhibit 7 - Defendants' Motion for Summary Disposition

In *Hughes, supra*, the Michigan Court of Appeals rejected the plaintiff roofer's argument that the porch roof on which he had been working was a common work area:

[P]laintiff points out that workers from State Carpentry assembled and attached the porch. Another subcontractor, Robert Wurm, installed the siding on the overhang. Yet another contractor would later be pouring the cement for the support stanchions. However, there is no evidence in the record that the employees of any other trade would work on top of the porch overhang. In all probability, after the carpenters built the overhang and attached it to the house, the only workers who would need to gain access to that limited area were the roofers [such as plaintiff]. Thus, giving plaintiff the benefit of any reasonable inferences, we cannot say that other workers would be subject to the same hazard.

* * *

We believe that a contrary conclusion would swallow the "rule" espoused in *Funk, supra*. If the top of the overhang or even the overhang in its entirety were considered to be a "common work area" for purposes of subjecting the general contractor to liability for injuries incurred by employees of subcontractors, then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended. This Court has previously suggested that the Court's use of the phrase "common work area" in *Funk, supra*, suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will "render it more likely that the various subcontractors... will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Funk, supra* at 104. We do not feel that such considerations dictate the result in the present case. [*Hughes*, 277 Mich App at 6-9 (certain internal citations omitted; emphasis added).

This explanation by the *Hughes* Court about the narrow scope of the common work area element was later endorsed, and quoted at length, by the Supreme Court in *Ormsby*, 471 Mich at 57 fn 9.

The Supreme Court reached the same result in *Alderman v JC Dev Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010), a case involving an accident where a subcontractor's crane made contact with power lines above a large construction site and electrocuted the plaintiff. The Court of Appeals in that case had observed that the crane nearly tore down the power lines, which would have created a hazard to the

Exhibit 7 - Defendants' Motion for Summary Disposition

many subcontractors who were working in the vicinity, and consequently the common work area element was easily satisfied. *Alderman v JC Dev Communities, LLC*, unpublished per curiam decision of the Michigan Court of Appeals, decided August 35, 2009, (Case No 285744). The Supreme Court reversed, holding that the common work area element is much narrower: "[t]he risk of injury at issue here was the risk of electrocution from a subcontractor's crane coming into contact with power lines above the construction site. The only employees exposed to the risk of electrocution were two to six employees of one subcontractor, including the plaintiff...." *Alderman*, 486 Mich at 906.

Likewise, in *Nagy v Consumers Power Co*, unpublished per curiam decision of the Michigan Court of Appeals, decided May 15, 2001 (Case No 672171) (attached hereto as **Exhibit J**), two workers were killed and one seriously injured when their metal scaffolding was pushed into an overhead power line. In finding for the defendants, the Court stated:

The area to be considered is narrowly proscribed to distinguish between a situation where employees of a subcontractor are working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors are all subject to the *same* risk or hazard.

In this case, plaintiffs failed to plead facts proving that employees of any other subcontractor worked in the same area and were exposed to the same risk of electrocution. Therefore, there is no question of fact regarding the presence of a common work area, and because all four elements must be met, liability on the basis of status as a general contractor is precluded. [*Id.* at *2-3 (emphasis in original; internal citations omitted).]

Here, there is no record evidence that the roof from which Velez fell was shared by more than one subcontractor. On the contrary, Mr. Gill has testified that there were no other subcontractors anywhere on the job site, let alone on the roof, at any time during their roofing work, let alone on the roof. See Gill Dep. at p 12. Plaintiff may attempt to argue that Shafer's own construction workers also worked near the top of the addition, albeit prior to the roofing work performed by Mr. Gill's team. But there is no dispute that Shafer's workers used a safety harness and rope, nor that those safety measures were insufficient. See Allison Dep. at p 20; Thomas Shafer Dep. at p 14; Madden Dep. at pp 26, 29. Thus, there is no evidence

Exhibit 7 - Defendants' Motion for Summary Disposition

that any other workers were exposed to the same risk as Larry Gill's team, of working on a roof with allegedly inadequate fall protection equipment. Furthermore, the metal decking work that was done by Shafer's workers *near the top of the structure* was not performed *on the roof*, as was the roofing work done by Larry Gill's team, and cannot satisfy the requirement that the risk be posed to multiple subcontractors *in the same area*, which the case law construes narrowly. See *Hughes*, 277 Mich App at 6-9 ("after the carpenters built the overhang and attached it to the house, the only workers who would need to gain access to that limited area were the roofers"). In addition, Shafer's construction workers worked directly for Shafer, so they would not satisfy the requirement that multiple subcontractors be present in any event. For all of these reasons, Plaintiff has failed to establish the common work area element, which is fatal to his claims.¹

- b. In addition, there were not a "significant number of workmen" exposed to the danger.

Although the case law does not specify the minimum number of workers required to satisfy the "significant number" requirement of the third element of the common work area exception, the Supreme Court in *Alderman*, 486 Mich at 906, has held that six workers is insufficient as a matter of law. This stands to reason, considering that the common work area exception is designed to apply to cases "involving very large construction sites." *Smith*, 490 Fed Appx at 684 (citing *Funk*, 392 Mich at 110). Here, Gill had only five workers with him who were exposed to the danger of working on the roof with an allegedly inadequate fall protection system on the first day of the job, and only three of whom were working on the day of Velez's fall.

¹ Plaintiff may argue that the Shafer Defendants' legal arguments do violence to the public policy of promoting safety in the workplace. But the Shafer Defendants do not dispute the importance of this public policy; they merely raise the question of to whom the law assigns the duty to provide workplace safety. The foundational premise of the common work area exception is that when only one subcontractor and its employees are on the job site, the subcontractor has the obligation to protect its own employees from the dangers associated with the subcontractor's own work. *Hughes*, 277 Mich App at 6-9. When there are multiple subcontractors on the jobsite, and the other elements of the common work area exception are

Exhibit 7 - Defendants' Motion for Summary Disposition

The Court of Appeals' opinion in *Hughes, supra* is again instructive in this regard:

We find this case to be distinguishable from *Funk, supra*, and its progeny. Liability was imposed on the general contractor in *Funk* because Funk fell from a highly visible superstructure that was part of the common work area, was within the control of the defendant, and posed a risk to thousands of other workers. In *Funk*, the Court employed a risk analysis, finding that liability should not be imputed unless the dangers in the work area involve "a high degree of risk to a significant number of workers." *Funk, supra* at 104 (emphasis added). See *Plummer v Bechtel Constr Co*, 440 Mich 646, 651, 489 NW2d 66 (1992) (the plaintiff fell from an interconnecting catwalk/platform system at a construction project involving 2,500 workers and a number of subcontractors)... Here, it is uncontroverted that plaintiff was one of only four men who would be working on top of the overhang. Accordingly, we conclude not only that plaintiff's injury did not arise in a "common work area," but that defendant did not breach its duty to guard against a danger posing a "high degree of risk to a significant number of workmen." *Funk, supra*. Defendant was entitled to judgment on this issue as a matter of law. [*Hughes*, 277 Mich App at 7-8 (italics in original; underlining added).]

As indicated, Plaintiff has not established that a "significant number" of workers of the roofing subcontractor Larry Gill were exposed to the risk of working on the roof with an allegedly inadequate fall protection system. See *Alderman*, 486 Mich at 906; *Hughes*, 277 Mich App at 7-8. This is a separate and independent reason why Plaintiff's claims must be dismissed with prejudice.

3. Nor does Plaintiff have any active negligence claim against the Shafer Defendants.

Although Plaintiff's Complaint asserts only premises liability (Count I) and common work area (Count II) claims, in an abundance of caution, the Shafer Defendants note that any active negligence claim against them would also fail as a matter of law. The reason is that, in Michigan, a contracting party owes a duty to prevent injuries that may result from its contractual performance only where the party creates a "new hazard."

Thus, in *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), the Michigan Supreme Court considered a case brought by a pedestrian against a snow removal contractor for injuries the pedestrian sustained when she slipped and fell on ice in the parking lot. The Supreme Court found that the contractor owed no duty to the plaintiff who fell, because the contractor "created no new hazard to established, the general contractor may have the obligation to protect employees of subcontractors from

Exhibit 7 - Defendants' Motion for Summary Disposition

plaintiff." *Id.* at 469. The Court distinguished an earlier case, *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703 (1995), in which a snow removal contractor "created a *new hazard*" by the way it piled the snow on the premises. *Fultz*, 470 Mich at 469 (emphasis in original).

In *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011), the Court was asked to decide a negligence action brought by the employee of an electrical subcontractor who was injured at a construction site when cement boards fell on him. The boards had been leaned against a wall by employees of the defendant drywall subcontractor. The plaintiff "sued defendant, alleging that defendant was negligent in stacking the cement boards in an unstable position, *creating a new hazard that previously did not exist.*" *Id.* at 161 (emphasis added). Because of the allegation that a "new hazard" had been created during the performance of the contract, the Supreme Court remanded the case to the trial court to determine whether the defendant in fact owed a duty of care. *Id.* at 172. Importantly, had there been no "new hazard," the defendant would have owed no duty as a matter of law. *See also Hill v Sears, Roebuck and Co*, 492 Mich 651, 671 – 672; 822 NW2d 190 (2012) (explaining that the defendants' installing of an electric clothes dryer and consequently concealing from view an uncapped gas pipe behind it "did not create a new dangerous condition," and thus they owed no duty relative to the subsequent gas explosion that destroyed the plaintiffs' house).

Applying this doctrine to the instant case, there is no evidence – let alone an allegation – that the Shafer Defendants created a new hazard that caused Plaintiff to fall off the roof. Rather, Plaintiff merely alleges that the fall protection system was inadequate to prevent the fall. *See Complaint at ¶¶ 23, 28.* Accordingly, should Plaintiff argue that she has also alleged an active negligence claim against the Shafer Defendants (she has not), any such claim would fail as a matter of law.

4. Finally, Plaintiff relies on impermissible speculation in an effort to prove causation.

dangers that arise from work other than their own. *Id.* But that is not this case.

Exhibit 7 - Defendants' Motion for Summary Disposition

As the Michigan Supreme Court noted in *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004), "[p]roximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." Like any other tort plaintiff, Plaintiff must prove "cause in fact" by "reasonable inference," and not by "speculation" and "impermissible conjecture." See *Pontiac School District v Miller Canfield Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997). Quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the *Pontiac School* court stated:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Pontiac School*, 221 Mich App at 615; citations omitted.]

Here, Plaintiff's claims against the Shafer Defendants are premised on a *res ipsa loquitur* theory: Velez fell from a roof, so the fall protection system must be responsible. There is not a shred of evidence, however, as to why he actually fell. Velez is now incompetent to give testimony, and he apparently has no recollection of the fall. Nor were there any witnesses to the fall.² There is no way Plaintiff can prove that her ward's fall was caused by an inadequate fall protection system with no evidence as to the circumstances under which he fell. Put differently, how can she prove that a purportedly adequate fall protection system would have prevented the fall, if there is no evidence as to why and how he actually fell? Perhaps he would have fallen in any event. Plaintiff's claims against the Shafer Defendants merely rely on impermissible speculation, and are insufficient as a matter of law, accordingly.

CONCLUSION

It is unfortunate that Velez's employer, Larry Gill, did not carry insurance. But that does not make Velez's injuries the responsibility of the Shafer Defendants. Rather, Plaintiff cannot prove her claims as a

² This is not surprising, considering that the fall did not happen in a "common work area" where multiple subcontractors and a significant number of workmen were working. Rather, it happened on an isolated roofing job involving a few other workers who were busy at work when Plaintiff's ward inexplicably fell from the roof.

Exhibit 7 - Defendants' Motion for Summary Disposition

matter of well-established Michigan law, and her complaint against these defendants must be dismissed with prejudice.

WHEREFORE, Defendants, Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and Karen J. Shafer as Trustee, respectfully request that this Honorable Court grant this Motion and dismiss Plaintiff's Complaint as against them in its entirety.

Respectfully submitted,

MADDIN, HAUSER, ROTH & HELLER, P.C.

By: /s/ Richard M. Mitchell
Richard M. Mitchell (P45257)
Jesse L. Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhauser.com
Attorneys for Defendants

DATED: April 30, 2018

Exhibit 7 - Defendants' Motion for Summary Disposition

PROOF OF SERVICE

The undersigned states that on April 30, 2018 she served Shafer Defendants' Motion for Summary Disposition, Brief in Support and this Proof of Service upon counsel of record by the MI-File e-file and serve system.

I declare the foregoing statement to be true to the best of my information, knowledge and belief.

/s/ Susan J. Beyer
Susan J. Beyer

Exhibit 8

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, as GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR.
an incapacitated individual,

Case No. 2017-2389-NO
Hon. Richard L. Caretti
(586) 469-5137

Plaintiff,

vs

RICHARD SCHAFFER, KAREN SCHAFFER,
R. SCHAFFER BUILDERS, RICHARD N. SCHAFFER,
Trustee of Revocable Living Trust Agreement
dated 12/14/89; KAREN J. SCHAFFER, Trustee of
Revocable Living Trust Agreement dated
12/14/89;

Defendants

GEORGE T. FISHBACK (P29763)
SACHS WALDMAN, PC
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207
(313) 965-3464
gtfishback@sachswaldman.com

RICHARD M. MITCHELL (P45257)
MADDIN, HAUSER, ROCH
& HELLER, P.C.
Attorneys for Defendants Shafers
28400 Northwestern Highway
Southfield, MI 48034
(248) 827-1875
rmitchell@maddinhauser.com

**PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION**

NOW COMES Plaintiff, Susan Moore, Guardian and Conservator of the Estate of Joseph Daniel Velez, Jr., a Legally Incapacitated Individual, by and through her attorneys, Sachs Waldman and, hereby submits her response to Defendants' Motion for Summary Disposition as follows:

Plaintiff submits that she has stated valid claims against the moving parties and that there is substantial evidentiary support for her claims, thus making summary

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

disposition inappropriate in this case. Further, Defendants' Motion is fatally defective because it fails to address the actual claims made in Plaintiff's Complaint. Plaintiff's response will be addressed in the following brief.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion for Summary Disposition; Plaintiff also respectfully requests that this Honorable Court grant her leave to file an Amended Complaint, to conform to the evidence, pursuant to MCR 2.116(l)(5) and MCR 2.118(c).

Respectfully submitted,

SACHS WALDMAN, Professional Corporation

BY: /s/ George T. Fishback
GEORGE T. FISHBACK (P39763)
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207-4160
(313) 965-3464
gtfishback@sachswaldman.com

DATED: May 25, 2018

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

This case arises out of an incident that occurred on August 24, 2016, when Plaintiff's ward, Joseph Velez, now a Legally Incapacitated Individual, fell off the unprotected edge of a 20 foot high roof on a construction site that was under Defendants' control. (**Exhibit A, Deposition of Raymond Shafer, pg. 69, lines 19-24; Exhibit B, Defendants' Answers to Plaintiff's Interrogatory #16**)

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

Mr. Velez suffered a devastating traumatic brain injury, as well as multiple broken bones. He has been rendered totally and permanently disabled. Mr. Velez is now Plaintiff's ward, as his injuries rendered him legally incompetent. This case concerns Defendants' negligence as both the landowner (premises liability) and the builder who retained control of the construction project.

Defendants erected and constructed the roof from which Mr. Velez fell. (**Exhibit C, Deposition of Elmo Madden, pp. 16-19**) It is undisputed that Defendants verbally hired an individual, Larry Gill, to install the roofing membrane, to cover the roof and make it water-tight. (**Exhibit D, Deposition of Lawrence Gill, pg. 32**) There were *no written contracts*: an unusual arrangement, to say the least, for a construction project.

Mr. Gill, in turn, hired Joseph Velez and a number of other workers on a cash basis—another suspect facet of this project—to provide the labor for the roof membrane's installation. The roofing work was subject to Defendants' control and approval, since there was no formal or written contract between Defendants and Mr. Gill. (**Exhibit D, pg. 30, 32-33**) The vague and ambiguous nature of this transaction, by itself, creates factual issues not properly resolved by Summary Disposition.

When Mr. Gill and the workers arrived on site, there was no attachment point to "tie off" for fall protection equipment. (**Exhibit D, pg. 14**) Prior to the subject incident, Defendants had negligently removed the anchor bolt that had been used to attach the workers' safety harnesses. (**Exhibit C, pg. 30**) Inexplicably, the temporary perimeter safety lines had been removed, leaving the roof edges exposed and completely unprotected. (**Exhibit D, pg. 43, lines 10-17**) The absence of fall protection for roofers working at a 20 foot height violated applicable fall protection safety standards and

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

MIOSHA regulations. Left without any fall protection, Mr. Velez fell from the unprotected roof edge and smashed into the concrete pavement twenty feet below. (*Exhibit E, Photograph marked as deposition Ex #1*) The life he knew before the incident has ceased to exist for Joe Velez.

Plaintiff's Complaint alleges valid claims of negligence and premises liability, which are supported by substantial evidence. Defendants' Motion is fatally defective to the extent that it fails to address these allegations and the factual support therefor. Defendants' Motion avoids addressing Plaintiff's principal allegations that:

- (1) Defendants actually erected and installed the unprotected 20 foot high roof, which created an unreasonable risk of harm; and
- (2) Defendants were in complete control of all aspects of this construction project. (*Exhibit D, Deposition of Lawrence Gill, pg. 32, 33, & 35*)

Lawrence Gill confirmed that Defendants exercised control of the construction:

Q. And if something came up during the process of the work that he wanted changed or done different, that was something that you could accommodate and you would just simply adjust the bill?

A. Yes, sir. (*Exhibit D, p. 33*)

Plaintiff's expert, Michael Wright, in his Affidavit, identified specific instances of Defendants' failure to take reasonable care, including:

29. Defendants were negligent in removing the fall protection anchor point on the roof prior to the installation of the roofing membrane.

30. Defendants failed to exercise reasonable care during the installation of the roofing membrane at the time of Plaintiff's incident, because no fall protection was being provided or used, contrary to MIOSHA and industry practice. (*Exhibit F, Affidavit of Michael Wright*) (*an original of the Affidavit will be provided to Court*)

Defendants in their brief concede that "the late Richard Shafer was a landowner and industrial developer in Romeo, Michigan." Defendants do not address Plaintiff's

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

allegation that Shafer was also the builder, who directly performed most of the actual work on this construction project, including the erection/construction of the roof itself. (Exhibit A, Deposition of Raymond Shafer, pgs. 23, 51-52 and 57-58) Thus, it is uncontroverted that Defendants created the unreasonably dangerous condition that directly led to Plaintiff's fall from the roof.

Defendants would prefer to sweep under the rug a significant fact in this case: there are no written construction contracts or subcontracts.

Q. Okay. It appears from the paperwork that there are no written contracts. Is that your understanding for any of the trade work?...

A. Yes. There are no contracts.
(Exhibit A, Deposition of Raymond Shafer, pgs. 39-40)

Apparently, Defendants hope that this Court does not notice the absence of written contracts. The clear implication is that Defendants never sought to delegate performance of certain aspects of the work, along with control over the construction project. Critically for Mr. Velez' injury, in the absence of written contracts, Defendants retained their responsibility for compliance with reasonable safety standards.

The omission is fatal to Defendants' Motion. Every case cited by Defendants involves written contracts or sub-contracts wherein the owner or general contractor sought to *delegate* control and/or safety responsibilities to a competent, qualified sub-contractor. Plaintiff will address the issue more fully below; however, it must be noted that control is a factual issue, not properly determined by Summary Disposition.

STATEMENT OF FACTS

Moving Defendant Richard Shafer was a Sole Proprietor doing business as R. Shafer Builder, a Macomb County Assumed Name. R. Shafer Builder held itself out as

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

as an experienced and expert builder of industrial buildings in Romeo, Michigan. (Exhibit G, R. Shafer Builder website; Exhibit A, pgs. 10-11)

In their Brief, Defendants admit ownership of the property and admit that they leased the existing building on the property to Hensley Manufacturing. Hensley was properly dismissed as a party Defendant, by this Court's Opinion and Order, dated May 8, 2018. Further, Defendants and Hensley Manufacturing entered into a lease, effective July 1, 2016, which applied to the addition Defendants were building and which stated:

"The Landlord and Tenant have also entered into an agreement for the Landlord to construct a 5,160 square foot addition to the building. When the built [sic] addition is completed, the tenant will pay an additional \$2,150 per month, in addition to the rent mentioned above for the term of the lease." (*Exhibit H, Deposition Exhibit 4*)

Hensley Manufacturing further confirmed that all aspects of the construction of the addition were under Defendants' control. According to Kelly Estrada, Hensley's Chief Financial Officer and Corporate Representative,

QUESTION: "... So from your perspective, am I correct in understanding that whatever was going on with the construction of the addition was outside of Hensley's operation and control and was being done by Shafer and/or people he hired to do it?

ANSWER: Correct" (*Exhibit I, Deposition of Kelly Estrada pg. 15, lines 3-8*)

Defendants fail to address Plaintiff's principal allegation that they maintained control over all aspects of the construction of the addition to the building and directly performed the actual construction of the majority of the addition, including the 20 foot high roof from which Plaintiff fell. As noted above, there are no written construction contracts or sub-contracts for work done on this construction project. Nor is there any other evidence indicating that Defendants relinquished possession, custody and control over the construction site. In the absence of such proof, the uncontradicted evidence

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

establishes that Defendants were in control of all aspects of the construction project. Again, this is a factual issue, not properly resolved by summary disposition.

Defendants' recitation of Shafer's involvement in the construction project is far from complete. Among other things, Defendants' Answers to Plaintiff's Request for Production of Documents, which were marked as Exhibit #6 at Raymond Shafer's deposition (and which are voluminous) establish that:

- Shafer retained the architect to design the building and create the blueprints.
- Shafer supplied the construction equipment involved in the project, specifically a backhoe, road grader and scissor lift, prior to the commencement of construction.
- Shafer personally performed the site preparation.
- Shafer personally excavated the trenches for the footings, and poured and grated the footings.
- Shafer ordered and arranged for delivery of all construction materials, including structural steel used to support the roof.
- Shafer obtained and used a mobile crane to assist with the installation of the structural steel roofing supports and Shafer erected the structural steel roof supports.
- Shafer installed the roof decking on the structural steel roof supports.
- Shafer installed the block wall insulation from the roof, after the decking had been installed.
- **Shafer removed the fall protection anchor point from the roof after the insulation was installed. (Exhibit C, Deposition of Elmo Madden, pg. 30)**
- Shafer ordered the roof sump components of the roofing system.
- Shafer verbally hired Larry Gill to install the roofing membrane on a "time and materials" basis. **(Exhibit D, Deposition of Larry Gill, p. 33-34)**

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

- At the time Shafer hired Larry Gill, Shafer knew or should have known that Larry Gill was *not a licensed or established contractor*, (*Exhibit D, Deposition of Larry Gill, p. 29*)
- Larry Gill did not maintain any type of business organization, payroll, insurance, safety program, or other business activities of a competent contractor. (*Exhibit D, Deposition of Larry Gill, p. 29-30, 34-35*)

Defendants admit that the late Richard Shafer either personally performed or participated in most of the work on this construction project. Discovery has also established that in addition to Richard Shafer, there were at least four other workers involved in the construction of the roof deck and who actually worked on it for Shafer:

1. Raymond Shafer, Richard Shafer's son and an employee of R. Shafer Builder,
2. Elmo Madden, an employee of R. Shafer Builder,
3. Mark Allison, an employee of R. Shafer Builder, and
4. Tom Shafer, a *contract worker* who was not technically "employed" by Shafer.

There is substantial testimony in the record establishing that Shafer maintained and exercised control over all aspects of the construction project, the majority of which was performed by it, including the erection and construction of the roof. When Richard Shafer hired Lawrence Gill to install the roofing system, Gill did not have any formal or established business. In fact, discovery has established that Mr. Gill had:

1. No employees, (*Deposition of Larry Gill, p. 29-30*)
2. No payroll and no withholding for tax, Social Security and/or Medicare (*Deposition of Larry Gill, p. 29-30*)
3. No Unemployment Insurance or Workers Compensation Insurance (*Deposition of Larry Gill, p. 29-30*)
4. No Liability Insurance (*Deposition of Larry Gill, p. 29-30*)

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

5. No formal or established safety program (**Deposition of Larry Gill, p. 34-35**)

Mr. Gill testified that Mr. Velez and the other workers on the project were simply "Day Laborers" and not his employees. (**Exhibit D, p. 30, lines 6-10**) Mr. Gill also testified that there were at least seven "Day Laborers" or workers on the roof on the first day of his work. (**Exhibit D, Deposition of Larry Gill, p. 11**)

Mr. Gill testified that at the time of the subject incident, there was no appropriate fall protection being used on the 20 foot high roof, as the perimeter lines had been taken down, leaving all of the roof edges exposed and unprotected. This is contrary to applicable and established fall protection regulations and procedures. (**Exhibit D, p. 45, lines 7-14**) and (**Exhibit F, Affidavit of Michael Wright, Plaintiff's expert**)

ARGUMENT I

DEFENDANTS ARE RESPONSIBLE FOR CREATING AND MAINTAINING A DANGEROUS CONDITION ON THEIR PROPERTY.

. According to the U.S. Bureau of Labor Statistics, "Roofer" is the fourth most hazardous occupational category. In 2016 alone, 101 roofers suffered fatal injuries. (**Exhibit F, Affidavit of Michael Wright**)

Count 1 of Plaintiff's Complaint alleges Premises Liability. It is axiomatic that "Premises Liability" is conditioned upon both possession and control over the land. This is so because 'The man in possession is in a position of control, and normally best able to prevent any harm to others.' " Merritt v Nickelson, 407 Mich 544 (1980) citing Prosser, Torts(4th Ed). Pg. 351.

As noted above, Discovery has established substantial evidence indicating Defendants were in possession and control of the construction project at all times.

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

Indeed, one unique aspect of this case is that there are no written contracts or other documents that would indicate or even tend to indicate that Defendants ever relinquished possession or control over the construction site.

Plaintiff alleges that Defendants failed to exercise reasonable care to protect Mr. Velez, a business invitee, from the unreasonable risk created by the dangerous, because unprotected, 20 foot high roof they had erected and constructed. In a critical instance of negligence, Defendants removed the fall protection anchor point on the roof, prior to the arrival of Mr. Gill and other workers involved in installing the roofing. *(Exhibit C, Deposition of Elmo Madden, pg. 30)* The roof edges were left unprotected and were unreasonably dangerous, due to the potential for serious or fatal injury resulting from a fall from 20 feet. *(Exhibit F, Affidavit of Michael Wright)*

Defendants claim that the open and obvious doctrine cuts off their liability for Mr. Velez' fall from the roof, but this argument is erroneous. While a landowner is not generally required to warn an invitee of hazards that are open and obvious upon casual inspection, our Supreme Court explained that there are two significant exceptions to the general rule. *Lugo v. Ameritech Corp.*, 464 Mich. 512; 629 NW2d 384 (2001)

The first of the exceptions is a hazard that is effectively unavoidable. Plaintiff is not arguing that this exception applies to the instant case.

The second exception discussed in *Lugo* is a hazard that is unreasonably dangerous, such that the landowner is required to take reasonable steps to protect an invitee, even though the hazard might be open and obvious. The example provided in *Lugo* is a visible pothole that presents an unreasonable danger because it is thirty feet

Document received by the MI Macomb 16th Circuit Court.

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

deep. The Court distinguished such a deep hole from the ordinary pothole commonly seen in parking lots because the peril of falling an extended distance was so severe.¹

The Michigan Court of Appeals considered a case in which an invitee suffered injuries after falling from a balcony *without a guardrail* in *Woodbury v. Bruckner*, 248 Mich. App. 684 (2001). The invitee fell about nine feet. The Court of Appeals said:

The danger of falling from the roof was open and obvious. However, even though the danger was open and obvious, defendants are not necessarily relieved of liability. *Id.*, at 689

The Court reversed the trial court's grant of summary disposition to defendants:

In view of the *absence of guardrails*, the *height* of the roof-top porch, and the inherent dangerousness of the condition, we conclude that a genuine issue of fact exists as to whether the risk of plaintiff falling from the roof remained unreasonable. *Id.*, at 689 (emphasis added)

In the instant case, Plaintiff Mr. Velez fell from a twenty foot height. Fall protection on the roof was not present. Unlike the situation in *Bruckner, supra*, Defendants here did not just omit fall protection; their active negligence removed that option. Defendants precluded Mr. Velez from using fall protection when it removed the anchor point. They *exacerbated* the hazard. It would be as if the hypothetical 30 foot pothole of *Lugo* had guardrails around it, and the landowner had removed them.

Defendants' active negligence clearly distinguishes the instant case from the Michigan Supreme Court opinion cited by Defendants. *Perkoviq v. Delcor Homes-Lake Shore Pointe, Ltd.*, 466 Mich. 11; 643 NW2d 212 (2002). The Supreme Court's opinion, as is apparent from its wording, rested upon an assumption that a contractor with employees working at heights would take reasonable safety measures; for instance, fall protection. The Court opined that a twenty foot roof did not present an unreasonably

¹ “Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury.” *Id.*, at 520 (emphasis added)

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

dangerous situation to an experienced roofer. Defendants might like to leave it at that, but more closely examining the Court's reasoning is important. The Court explained:

In its status as owner, defendant had ***no reason to foresee*** that the only persons who would be on the premises, various contractors and their employees, would not ***take appropriate precautions*** in dealing with the open and obvious conditions of the construction site. *Id.*, at 18 (emphasis added)

Quite the contrary, in the instant case Defendants had ***every reason to foresee*** that Mr. Velez would not be able to use fall protection because Defendants had removed the anchor point. ***Indeed, Mr. Velez was precluded by Defendants' actions from taking appropriate precautions.***

Furthermore, Defendants, in their zeal to save money, had not hired a bona fide independent contractor with its own commitment to safety standards. Instead, they hired an individual, Larry Gill, who cut corners when it came to the safety of Mr. Velez and the other roofers. Having hired Gill, who had no established business, no employees, and no safety program for his "day workers," it was foreseeable to Defendants that "appropriate precautions," in the words of *Perkoviq*, would be ignored. Mr. Velez' situation is not analogous, therefore, to that of the workers in *Perkoviq*.

In a remarkable passage, Gill testified that he "had talked to particular Shafer, and he had said that he can't pay me ***until we had a company that was licensed and insured.***" (*Exhibit D, p. 20, lines 9-12, emphasis added*) Here is an alarm bell ringing. This implies Defendants' knowledge or awareness of Mr. Gill's inability to properly undertake this job. At least, it establishes a "reason to foresee" or anticipate that Gill would not "take appropriate precautions" to provide proper fall protection. Again, what is reasonably foreseeable is a fact question. Defendants cannot contract with an individual with no safety program who hires "day laborers" on the cheap and

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

then argue that the injury that befell one of the roofers was unforeseeable. This alone distinguishes the instant case from *Perkoviq*. *In the absence of safety measures*, the roof on which Mr. Velez worked became unreasonably dangerous.

Defendants cite to *Hughes v. PMG Bldg.*, 227 Mich. App. 1; 574 NW2d 691 (1997) in an attempt to bolster their faulty position on premises liability. In that case involving a construction accident, defendants invoked the open and obvious defense. While the trial court granted summary disposition, the Michigan Court of Appeals partially reversed, finding that an issue of fact remained as to premises liability.

Defendant quotes from the deposition of Larry Gill to the effect that Mr. Velez would have seen the same type of roofing project scores of times before. No, he would not. It is highly unlikely that Mr. Velez, or any other roofer working in Michigan, would have often seen roofing projects where not only was fall protection absent, but the builder had removed the means for anchoring fall protection. Unlike Defendants' construction site, most projects in Michigan comply with MIOSHA rules.

Defendants had two reasons to foresee that the roofers would not/could not take the appropriate safety measures. First, Defendants' were actively negligent in removing the anchor points. Second, lax safety standards are the foreseeable result when a builder hires a "contractor" on the cheap. The salient facts of the instant case are readily distinguishable from those before the Supreme Court in *Perkoviq*. The hazard created by Defendants' "business plan" was unreasonably dangerous because safety standards were ignored. Mr. Velez paid the price of Defendants' cost cutting.

ARGUMENT II.

DEFENDANTS ARE LIABLE UNDER THE "COMMON WORK AREA THEORY"

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

In *Funk v General Motors Co*, 392 Mich 91; 220 NW2d 641 (1974), the Michigan Supreme Court articulated the "Common Work Area" doctrine, which holds the landowner and/or general contractor responsible for implementing and coordinating job safety. An owner may be held responsible if it retains control of the construction, as Defendants did. "An owner is responsible if he does not truly delegate..." *Id.*, at 101. In *Funk*, the Court said that the actual working relationship evidenced exercise by the landowner of a retained control of the project. *Id.*, at 105

The Michigan Supreme Court confirmed the four part test of establishing "Common Work Area" liability in *Ormsby v Capital Welding Inc.*, 471 Mich 45; 684 NW2d 320 (2004). The court stated that a property owner or general contractor can be liable under the Common Work Area doctrine if:

- (1) Either the property owner or general contractor failed to take reasonable steps in its' supervising and coordinating authority
- (2) To guard against readily observable and avoidable dangers
- (3) That created a high degree of risk to a significant number of workmen
- (4) In a common work area.

Discovery has established that each of the four factors is present in this case. Before discussing the four factors, it is important to note that this case is unique, and is distinguishable from the facts before the Courts in *Funk*, *Ormsby*, and all of the cases cited in Defendants' brief. Specifically, Discovery has established that there were no written contracts in this case. Rather, in the instant case Defendants were the actual "builder" of the construction project. They merely hired help to finish certain limited aspects of the construction project. Significantly, this case does not involve the typical general contractor/sub-contractor relationship(s).

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

Underscoring the unique circumstances of this case is Defendants' hiring of Larry Gill, rather than an established independent contractor, to assist in installing the roofing material. At all times relevant to this case, Larry Gill was an individual: he did not operate any type of business entity. Because of this, Defendants were able to obtain a substantially reduced price for the work performed by Mr. Gill. In fact, Gill himself opined that an "established contractor" would have cost Defendants "[p]robably over double" compared to his charge. (*Exhibit D, p. 35, lines 18-21*)

Defendants are now ensnared in a web of their own making. They cannot benefit from Gill's cut-rates and, when it is legally convenient for them, claim that Mr. Gill was a competent, qualified contractor or sub-contractor, within the meaning of *Funk, Ormsby*, and their progeny. As our Supreme Court said of the owner in *Funk*,

In the area of job safety their knowing acquiescence in nonperformance encouraged, if not legitimized, the derelictions of the sub- and general contractors. *Funk, supra*, at 108

In *Funk*, the Supreme Court announced the policy supporting the "Common Work Area" doctrine: the owner and/or general contractor is the entity in the best position to implement and coordinate job safety. Given the unique circumstances in this case, the Shafer Defendants were best positioned to implement and coordinate job safety, especially as most workers on this job were not technically "employed." Rather, they were individuals hired to provide "day labor," and were either paid by cash or "straight check" without deductions.

Defendants "failed to take reasonable steps within its supervising and coordinating authority" to ensure that fall protection safety measures were implemented. (*Exhibit F, Affidavit of Michael Wright*) Failing to provide adequate fall protection on

Document received by the MI Macomb 16th Circuit Court.

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

the 20 foot high roof satisfies the second factor "to guard against readily observable and avoidable dangers." (*Exhibit F, Affidavit of Michael Wright*). Plaintiff submits that the risk of falling off the unprotected edge of a 20 foot high roof creates "a high degree of risk," under any circumstances.

Discovery in this case has established that there were at least 11 workers, and possibly more, assigned to work on the roof at one time or another. Significantly, while three of the workers were employees of Defendants, another of Defendant's workers was not a direct employee. Additionally, none of the seven workers involved in the installation of the roofing material were "employed" by anyone. Because of this, they were not technically subject to the direction and discipline created by an employment relationship, nor were they protected by an employer sponsored safety program.

Given the unique manner in which Defendants chose minimal, if not virtually non-existent structure for the work environment on this job, Plaintiff submits that there is more than sufficient evidence that the unprotected 20 foot high roof "created a high degree of risk to a significant number of workmen."

The final element required under *Funk* and *Ormsby* is that the incident occurs "in a common work area." Notably, the contractors and/or workers do not need to be present in the common work area at the same time. Rather all that is required is that they be present within the area at some point in time. The Court of Appeals stated:

It is not necessary for other subcontractors to be working on the same site **at the same time**. Rather, the common work area concept merely requires that employees of two or more subcontractors eventually work in the area. *Phillips v. Mazda Motor Mfg. (USA) Corp.*, 204 Mich. App. 401, 408; (1994) (emphasis added) See, *Erickson v. Pure Oil Corp.*, 72 Mich. App. 330 (1976)

Viewed in the light most favorable to Plaintiff, the roof constituted a common

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

work area because both Shafer workers and the seven non-employee workers arranged by Larry Gill, as well as the plumber, all worked on the roof. The fact that the workers hired by Gill were not "employees," but rather "day laborers," is additional support for the conclusion that the roof constituted a common work area. At a bare minimum, this is a factual question not subject to summary judgment.

The Court in *Funk* framed the issue before it as follows:

The question now presented is whether, in the circumstances of this case, the immediate employer having conspicuously failed to provide any safety equipment, this general contractor and this owner, fully knowledgeable of the employer's dereliction, had the responsibility either to require the employer to implement a meaningful safety program or to themselves supply the obviously necessary safety equipment. *Id.*, at 102.

Our Supreme Court said that the answer to the question posed was yes, and the owner had responsibility to step in when the immediate employer failed. Given the facts of the instant case, and applying the Court's reasoning in *Funk*, Defendants here are responsible for Mr. Valez' injury. However, in this case Defendants bear the added responsibility of having negligently removed the anchors for fall protection.

ARGUMENT III

PLAINTIFF CAN ESTABLISH CAUSATION

Defendant's final argument is that Plaintiff cannot prove causation. At the outset, it should be noted that causation is generally a question of fact for the jury. More specifically, Michigan courts have held that whether the absence of a safety measure was the cause of a plaintiff's injuries should be left to the jury. See, for instance, *Mills v. A. B. Dick Co.*, 26 Mich App 164; 182 NW2d 79 (1970). The court in *Mills* stated:

If the jury find that the failure to have provided handrails was negligence, it could also find from the evidence presented that there was a causal relationship between the absence of the railing and Sidney Mills' injuries.

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

Id., at 169

The Michigan Supreme Court held similarly in *Davis v. Buss Mach. Works*, 175 Mich. 61, 73; 140 NW 986 (1913), where the Court explained:

Neither can we say that the cause of the injury was not the failure to provide a railing. Had there been a railing present plaintiff perhaps might have saved himself from injury even while falling. This was for the jury to say under the evidence.

Moreover, the *Funk* decision focused on the absence of fall protection.

Funk's injuries probably would have been kept to a minimum or avoided altogether if there had been provided either suspending nets, scaffolding, bucket cranes, safety belts or harnesses. *Funk, supra* at 103

Pursuant to applicable law, Plaintiff is entitled to a presumption that reasonable fall protection measures would have made this tragic incident less likely. However, Plaintiff does not need to rely on this presumption, as his expert, Michael Wright, addresses this in his Affidavit.

That had reasonable, required fall protection measures been provided, then the potential for Plaintiff's fall from the roof would have been significantly reduced, if not eliminated. (*Exhibit F, Paragraph #32*)

At least, there is a genuine issue of fact as to causation that a jury should decide.

DEFENDANTS WERE DIRECTLY AND ACTIVELY NEGLIGENT

Based on new evidence revealed by Discovery, Plaintiff claims that Defendants were actively negligent in removing the fall protection anchor prior to the installation of the roofing membrane. Pursuant to MCR 2.116(l)(5), Plaintiff requests the opportunity to amend her pleadings to conform to the evidence, as permitted by MCR 2.118(c). This amendment is necessary because Defendants' removal of the anchor point was not discovered until the deposition of Defendant's employee, Elmo Madden.

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Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

Michigan appellate courts have stated that the open and obvious defense is not applicable to active negligence claims; rather this defense is limited to product liability or premises liability claims. "The open and obvious doctrine is inapplicable to plaintiff's ordinary negligence claim." *Hiner v. Mojica*, 271 Mich. App. 604; 722 NW2d 914 (2006)

The Michigan Court of Appeals made this distinction; for instance, in *Laier v. Kitchen*, 266 Mich. App. 482; 702 NW2d 199 (2005). The Court observed:

In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability **based on the defendant's conduct**, as in this case. *Id.*, at 493. (emphasis added)

In this instance, the Defendants were actively negligent in that they removed the fall protection anchors from the roof and by their actions actually made Mr. Velez' plight worse. They created a more dangerous situation, as the defendant did in *Loweke v. Ann Arbor Ceiling & Partition Co., L.L.C.*, 489 Mich. 157; 809 NW2d 553 (2011).

CONCLUSION

Defendants cannot evade their responsibility for providing an unreasonably dangerous premises for their business invitee, Joseph Velez. As premises owner, they are liable for **unreasonably dangerous** hazards on the land, even if those hazards are open. What sets apart the hazard posed by Defendants' roof from ordinary roofing jobs is that Defendants made Mr. Velez' situation worse by foreclosing his ability to use fall protection measures when they removed the anchors. Mr. Velez, unlike the vast majority of roofers who work where MIOSHA standards are adhered to, could not take the proper measures to mitigate the dangers of working twenty feet above the ground.

Document received by the MI Macomb 16th Circuit Court.

Exhibit 8 - Plaintiff's Response to Defendants' Motion for Summary Disposition

The lack of fall protection was precisely the hazard cited by our Supreme Court in *Funk, supra*, when the Court originally established the common work area doctrine. Defendants here never relinquished control of the work site. Instead of hiring a professional independent contractor, they opted to cut costs, thereby cutting corners on safety. Now that they have banked the profit accruing from that dubious bargain, they should not be allowed to unjustly enrich themselves at the expense of Mr. Velez. Defendants should be held accountable.

At the very least, genuine issues of material fact remain in this case and they should properly be decided by a jury trial.

IN LIGHT OF THE FOREGOING, Plaintiff respectfully submits that this Court should properly deny Defendant Shafer's Motion for Summary Disposition and allow this case to proceed to a Trial on the merits; Plaintiff also respectfully submits that this Court should properly grant leave for Plaintiff to file an Amended Complaint, pursuant to MCR 2.116(l)(5) and 2.118(c).

Respectfully submitted,

SACHS WALDMAN, Professional Corporation

BY: /s/ George T. Fishback
GEORGE T. FISHBACK (P39763)
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207-4160
(313) 965-3464
gtfishback@sachswaldman.com

DATED:

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Exhibit 9

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR., an
Incapacitated individual,
Plaintiff,

V

Case No. 17-2389-NO
Hon. Richard L. Caretti

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89; HENSLEY
MFG, INC., a Michigan corporation,
Defendants.

SACHS WALDMAN, P.C.
By: George T. Fishback (P29763)
2211 East Jefferson Avenue, Suite 200
Detroit, Michigan 48207
(313) 965-3464 / (313) 965-4315 fax
gtfishback@sachswaldman.com
Attorneys for Plaintiff

MADDIN, HAUSER, ROTH & HELLER, P.C.
By: Richard M Mitchell (P45257)
Jesse L Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhausser.com
Attorneys for Shafer Defendants

REPLY BRIEF IN SUPPORT OF SHAFER DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiff's Brief fails to address the actual issues in this matter. It makes no difference whether the Shafer Defendants had a written contract with the roofing subcontractor Larry Gill, or whether Plaintiff's hired expert will testify consistent with his conclusory affidavit. What matters is that Plaintiff tries but fails to distinguish the binding Supreme Court precedent that mandates summary disposition of all of her claims.

I. The Court of Appeals' Woodbury decision does not save Plaintiff's premises liability claims.

Plaintiff relies on a footnote in *Lugo v Ameritech Corp, Inc.* that while a common pothole contains no special aspects, a thirty-foot-deep unmarked "pothole" could satisfy the special aspects exception to the open and obvious doctrine. 464 Mich 512, 518 n 2. Plaintiff also relies on *Woodbury v Bruckner*, a Court

Exhibit 9 - Defendants' Reply Brief to Plaintiff's Response to Defendants' Motion for Summary Disposition

of Appeals case that found special aspects that rendered an unguarded rooftop porch unreasonably dangerous. 248 Mich App 684 (2001). Those cases, however, are distinguishable. Lugo and Woodbury each considered a condition potentially accessible to a large number of people. Woodbury dealt with a rooftop porch that was easily accessible to “[a]ny person at the apartment, child and adult alike.” Id. at 687. The footnote in Lugo stated that only a highly unusual “gaping hole in a parking lot,” would satisfy the special aspects exception. 464 Mich 512, 518 n 2. The Supreme Court has since explained that an unmarked thirty-foot-deep pit in the middle of a public parking lot and an outdoor, unguarded porch accessible to tens of children present “unreasonably high” risks that are “inexcusable.” *Hoffner v Lanctoe*, 492 Mich 450, 462 (2012). The flat roof of a building under construction, however, which is accessible only to a team of roofers, poses no such public risk.

Moreover, the year after both Lugo and Woodbury were decided, the Supreme Court ruled in *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, that the sloped roof of a building under construction that was covered in ice and snow did not satisfy the special-aspects exception. 466 Mich 11, 19-20 (2002). *Perkoviq* is fatal to Plaintiff’s arguments. There, the plaintiff was an employee of a subcontractor that was hired by the owner of a house under construction to paint the upper level exterior of the house. The plaintiff fell from the roof, and alleged it was because the defendant, who was the property owner and general contractor, did not ensure that there was a fall protection system. After finding that the conditions of the roof were open and obvious, the Court explained: “To avoid summary disposition on this type of claim, a plaintiff must present evidence of ‘special aspects’ of the condition that differentiate it from the typical sloped rooftop containing ice, snow, or frost.” Id. at 20. Thus, *Perkoviq* makes clear that the risk of working at heights without fall protection equipment, even in icy conditions on a sloped roof, is insufficient to satisfy the narrow special-aspects exception to the open-and-obvious doctrine.

Plaintiff attempts to distinguish *Perkoviq* by arguing that the flat, dry roof off of which he fell was more unreasonably dangerous than the icy, sloped roof that did not have a fall protection system in

Exhibit 9 - Defendants' Reply Brief to Plaintiff's Response to Defendants' Motion for Summary Disposition

Perkoviq, because the Shafer Defendants should have foreseen that Larry Gill would not use a fall protection system. Plaintiff focuses on the Shafer Defendants' installation of a temporary anchor point to which they connected their safety ropes while they were laying metal decking at the top of the structure, and their subsequent removal of their temporary anchor point after their work was complete, which removal was necessary before the roof could be installed. There is no evidence that the removal of the temporary anchor point somehow prevented the roofing subcontractor Larry Gill from taking adequate safety measures to protect his workers, including for example installing his own temporary anchor point in an appropriate place, as was his duty under well-established Michigan law. See *Latham v Barton Malow Co*, 480 Mich 105, 112 (2008); *Hughes v PMG Building, Inc*, 227 Mich App 1, 6 (1997) (in Michigan, as a matter of public policy, subcontractors on a job site have a duty to ensure the site is safe for their workers). Plaintiff argues that because it turned out that Larry Gill did not have liability insurance, the Shafer Defendants should have known he would not take adequate safety measures. These arguments are non sequiturs. In fact, the Shafer Defendants fully expected Larry Gill to comply with his safety duties, and there is not a shred of evidence to the contrary. As a matter of law, the fall hazard was no more dangerous than that in *Perkoviq* where the plaintiff fell from an icy, sloped roof, and it certainly was not a public risk like that in *Lugo and Woodbury*. Plaintiff's premises liability claims must be dismissed, accordingly.

II. Plaintiff cannot establish the third or fourth element of her common work area claims.

Plaintiff's Response Brief simply ignores that the common work area doctrine only applies in cases "involving very large construction sites." *Smith v BREA Property Management of Michigan LLC*, 490 Fed Appx 682, 684 (CA 6, 2012) (citing *Funk*, 392 Mich at 110). In the Supreme Court's *Funk* case, for example, liability was only imposed on the general contractor because the plaintiff fell from "a highly visible superstructure that was part of the common work area... and posed a risk to thousands of other workers." *Hughes*, 277 Mich App at 7-8 (citing *Funk*, supra; emphasis added). Specifically, the common work area exception to the general no-liability rule only applies where the subject risk is posed to a (1) significant

Exhibit 9 - Defendants' Reply Brief to Plaintiff's Response to Defendants' Motion for Summary Disposition

number of workers of (2) at least two subcontractors. *Omsby v Capital Welding, Inc*, 471 Mch 45, 54 (2004).

Plaintiff for some reason focuses on Larry Gill's testimony that his roofers were not technically his employees. But it is hard to see how that helps Plaintiff prove that a significant number of workers of at least two subcontractors were exposed to the risk of working on a roof with an inadequate fall protection system. As briefed in the Shafer Defendants' motion, Gill had only five workers with him who were exposed to the danger of working on the roof with an allegedly inadequate fall protection system on the first day of the job, and only three of whom were working on the day of Velez's fall.¹ As expected, Plaintiff argues that Shafer's own construction workers also worked near the top of the addition prior to the roofing work performed by Gill's team. But she cannot and does not dispute that Shafer's workers used a safety harness and rope, nor that those safety measures were insufficient. This is fatal to Plaintiff's argument that other workers were exposed to the same risk as Larry Gill's team, of working on a roof with allegedly inadequate fall protection equipment. In addition, Shafer's construction workers worked directly for Shafer, so they simply cannot satisfy the requirement that multiple subcontractors be present.² As a matter of law, the record evidence does not show that a (1) significant number of workers of (2) at least two subcontractors were exposed to the same risk as Velez, either of which is a sufficient reason to require the dismissal of Plaintiff's common work area claims.

III. It would be futile for Plaintiff to amend her complaint to add an active negligence claim.

Plaintiff asks for leave to amend her complaint to add an active negligence claim on the basis of the aforementioned fact that the Shafer Defendants installed and then removed their temporary anchor

¹ The Supreme Court has held that six workers is insufficient as a matter of law. *Alderman v JC Dev Communities, LLC*, 486 Mch 906 (2010).

² Plaintiff also alleges that a plumber was a second subcontractor exposed to the same risk. This allegation is made up out of whole cloth. Plaintiff does not even attempt to cite to any record evidence to support this allegation. In fact, there is no record evidence of any plumber working on the roof with inadequate fall protection equipment. This allegation should be disregarded.

Exhibit 9 - Defendants' Reply Brief to Plaintiff's Response to Defendants' Motion for Summary Disposition

point. As briefed in the Shafer Defendants' motion, this amendment would be futile. Plaintiff could only maintain an active negligence claim against the Shafer Defendants if they created a "new hazard." *Fultz v Union-Commerce Associates*, 470 Mich 460, 469 (2004); *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 161, 172 (2011). In *Loweke*, for example, a cement board negligently stacked by the defendant fell on the plaintiff. *Id.* at 161. But that is not this case, where the risk of falling off a roof was not a "new hazard" created by the Shafer Defendants' installation and removal of an anchor point. Rather, this case is similar to *Hill v Sears, Roebuck and Co*, 492 Mich 651, 671 – 672 (2012), in which the Supreme Court held that the defendants' installing of an electric clothes dryer and concealing from view an uncapped gas pipe behind it "did not create a new dangerous condition," even though it led to a gas explosion. So too here, the Shafer Defendants' installation and then removal of their temporary anchor point so that the roof could be installed "did not create a new danger" of falling off the roof, which risk existed before the anchor point was installed and after it was removed. In fact, the subject facts are even more favorable than those in *Hill*, where the defendants concealed a highly dangerous condition, because the removal of the anchor did not in any way conceal the danger or otherwise prevent Gill from taking adequate safety measures to protect his workers as was his duty.³

MADDIN, HAUSER, ROTH & HELLER, P.C.

By: /s/ Richard M Mitchell

Richard M Mitchell (P45257)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
mitchell@maddinhauser.com
Attorneys for Shafer Defendants

Dated: May 30, 2018

³ In addition, the Shafer Defendants rely on the argument briefed in their motion that Plaintiff does not have sufficient evidence of causation as a matter of law. See *Pontiac School District v Miller Canfield Paddock & Stone*, 221 Mich App 602, 615 (1997). Plaintiff responds by attaching her hired expert's affidavit. But "there must be facts in evidence to support the opinion testimony of an expert" for the opinion to be reliable under MRE 702. *Skinner v Square D Co*, 445 Mich 153, 173 (1994). Here, where Plaintiff's expert's opinion is not based on any fact in evidence as to why Velez fell, the opinion is inadmissible under MRE 702.

PROOF OF SERVICE

The undersigned states that on the 30th day of May, 2018 she served a copy of the Reply Brief in Support of Shafer Defendants' Motion for Summary Disposition and this Proof of Service on the deponent and the attorneys of record by the Mi-File e-file and serve system of the Macomb County Circuit Court.

I declare that the statements above are true to the best of my information, knowledge and belief.

/s/ Jill M. Stem

Jill M. Stem

Exhibit 10

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

- - -

SUSAN MOORE, Guardian and
Conservator, et al,

Plaintiff,

vs.

Case No. 17-2389 NO

RICHARD SHAFER, ET AL,

Defendant.

_____ /

PROCEEDINGS

BEFORE THE HONORABLE JAMES BIERNAT, SR., JUDGE

Mount Clemens, Michigan - June 4, 2018

APPEARANCES:

For the Plaintiff: George T. Fishback-P29763
Sachs Waldman PC
2211 E Jefferson Ave Ste 200
Detroit, MI 48207-4160

For the Defendant: Richard M. Mitchell-P45257
Maddin Hauser Roth & Heller PC
28400 Northwestern Hwy Ste 300
Southfield, MI 48034-8348

Deborah J. Doyle, RPR, CSR 2179
Official Court Reporter
PO BOX 463147
Mount Clemens, MI 48043
(586) 477-0099

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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TABLE OF CONTENTS

Page

WITNESSES:

(No witnesses offered)

EXHIBITS:

Received

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Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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Mount Clemens, Michigan

June 4, 2018

At about 9:48 a.m.

- - -

(REPORTER'S NOTE: "Indiscernible" means a word or words were not heard well enough to be able to discern a proper interpretation either because of shuffling of papers, or the speaker did not talk loud enough, or was not picked up by the microphones.)

(Court and Counsel present.)

THE CLERK: Moore versus Shafer.

MR. FISHBACK: Good morning, Your Honor. George Fishback on behalf of the Plaintiff, Susan Moore, Guardian and Conservator of Joseph Velez.

MR. MITCHELL: Good morning, Your Honor. Richard Mitchell on behalf of the Defendant. This is a matter, is a matter of summary disposition.

THE COURT: Please, if you would keep your remarks as brief as you can and highlight

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 those issues you believe are most salient.

2 MR. MITCHELL: Sure, sure. I was going
3 to do that anyway, in the context that the Court
4 has read these voluminous (indiscernible) --

5 THE COURT: The Court has but the Court
6 is as well will issue a written opinion in this
7 case very shortly, but I want to hear your
8 argument first.

9 MR. MITCHELL: Essentially as the Court
10 is aware this is a fall of a commercial roofer on
11 August 24th of 2016. Importantly at the outset I
12 think this is really critical. We have
13 absolutely no idea what happened. There will be
14 no evidence at trial as to what happened. There
15 were no witnesses. In fact, his co-workers
16 didn't notice that he fell for a while.

17 Mr. Velez is in a position that he
18 cannot offer any testimony in this case. Nobody
19 knows. He could have jumped. He could have been
20 dancing at the edge of the roof.

21 We don't know. I'm not suggesting
22 those things happened. My point is we have no
23 idea and I think that is fatal right at the
24 outset.

25 I agree with counsel that Shafer

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 Builders performed the vast majority of this
2 work, but they didn't do this particular work and
3 that is an important distinction, Your Honor.

4 On this particular day they had
5 contracted with Larry Gill who brought in Mr.
6 Velez and there were two other individuals on
7 that day. Importantly, four people that day,
8 five the previous day, four that day.

9 I agree, no written contract. I don't
10 think that is relevant at all. Richard Shafer
11 is, has been (indiscernible) like for decades,
12 may not be the most prudent way to do it, but
13 this is just how he did it.

14 And so there is no written contract.
15 It doesn't really matter. There is no dispute
16 that Mr. Gill and his four people were to do this
17 particular job on this particular day and there
18 is no dispute that the Shafer individuals were
19 not there, nor was anybody else frankly.

20 The two theories that are pled in the
21 complaint essentially are premise liability and
22 common work doctrine, common work area doctrine.
23 These are the two exceptions to the very well
24 established general rule that an owner or
25 contractor does not owe, is not responsible for

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 the negligence of a subcontractor.

2 These are the ways around it. Now they
3 do ask to amend the complaint to add a count of
4 negligence, which I would like to address very
5 briefly, but I believe that would be completely
6 futile and we did address that in our reply
7 brief.

8 Briefly, Your Honor, as to the premise
9 claim, the duty of an owner or contractor is to
10 warn of a danger that the owner should reasonably
11 know the contractor is not going to see.

12 In other words, if it is open and
13 obvious, there is no responsibility.

14 Here we have a flat roof on what Mr.
15 Gill described as an average summer day. Mr.
16 Velez had been with Mr. Gill on roofs like this,
17 he said, 60 to 80 times. I mean, these were
18 experienced guys. These weren't guys off the
19 street. They had done this for a long time.

20 Mr. Gill has been doing it since 1984.
21 So they knew. These were not cheap off the shelf
22 guys. They knew what they were doing.

23 I think this case is similar to the
24 case of Perkoviq versus Delcore Homes where the
25 Court found that an icy sloped roof did not reach

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 the liability on behalf of the owner.

2 Here you have a flat roof on a summer
3 day, no ice. I just don't think that case is
4 distinguishable.

5 I know plaintiff cites to the special
6 aspect exception of this, and cites really a foot
7 note in the Lugo case. And quite honestly, that
8 case said you had a 30 foot pothole and the Court
9 said well that is not your typical pothole. It
10 may be on Michigan roads, that is possible.

11 THE COURT: I think you are right.

12 MR. MITCHELL: But I agree that's an
13 unusual situation. There is nothing unusual
14 about this situation. This is something that Mr.
15 Gill had seen, Mr. Velez had seen on 60 to 80
16 times.

17 As to the common work area doctrine,
18 which is the other exception. We are not arguing
19 about first and second. There are four elements
20 and all four have to be present.

21 We agree that one and two are. It is
22 three and four that are the problem. Created a
23 high --

24 It created a high degree of risk to a
25 significant number of workers. We cited the case

7

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

1 law. I'm not going to go through the cases.

2 Your Honor has them.

3 In this particular case you had Mr.
4 Velez who was, ironically he was the safety guy
5 and then three other workers on that day. There
6 were, there were I believe five the day before,
7 that is true. But we talked about some case law
8 in our brief that says six is not sufficient. So
9 I don't think that number three is met. And it
10 is not a common work area because only Mr. Gill,
11 his people were up there on that day.

12 And the fact that there is no written
13 contract with any of them, I don't know that is
14 terribly unusual here.

15 Your Honor, it doesn't make them all
16 independent separate contractors. So it really
17 wasn't a common work area. I do think the
18 speculation issue is fatal, Your Honor. There
19 has to be something presented in trial as to what
20 happened, and there is nobody who has any idea.
21 We have done some fairly extensive discovery, and
22 there is not going to be a witness to say here is
23 what happened. There is not going to be any
24 evidence to say here is why he fell; there won't
25 be. And I think that is fatal in and of itself.

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 Finally I would like to address briefly
2 the request to amend the complaint to add a count
3 of negligence. I understand there was an anchor
4 there that Shafer used when they were up there.
5 Shafer was not there when this happened.

6 In order to have a count of act of
7 negligence and have that be a viable count the
8 owner or contractor has to create a new hazard.

9 Now we can debate whether that anchor
10 could have been --

11 Given what these guys were doing that
12 day, it was up to Mr. Gill and his people and the
13 people were out there to provide for their own
14 safety. I don't believe under the law that we
15 discussed in the reply brief that even if the
16 anchor was there when Shafer, they put it there
17 and then took it back out when they left. That
18 is not creating a new hazard.

19 The roof is what it is. It is a flat
20 roof. It didn't have an anchor there to start
21 with. It didn't have an anchor there when Mr.
22 Gill was up there and Mr. Velez. And I don't
23 believe that is a new hazard at all. I think an
24 amendment would be futile, but that I think would
25 be the only thing they can get around some of

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 the deficiencies here.

2 I thank you Your Honor, I tried to be
3 brief.

4 THE COURT: Thank you. You did good.

5 MR. FISHBACK: Thank you, Your Honor.

6 I'm going to jump around a little bit, and
7 address the last point first.

8 And that is counsel concedes that his
9 client the Shafer defendant, erected and
10 constructed the roof including the anchor point.
11 That is a bolt that is used for fall protection
12 for the roofer on the roof.

13 So his last statement is kind of a
14 mischaracterization in the sense that when the
15 roof --

16 When the defendant constructed and
17 erected the roof, they installed an anchor point
18 for fall protection.

19 They removed that anchor point prior to
20 inviting Mr. Gill and these other individuals to
21 install a membrane, a waterproof covering over
22 the roof that they had constructed. So I just
23 want to be clear on that.

24 In regard to causation, we have a
25 situation where an individual fell off an

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 unguarded, unprotected flat roof that is 20 feet
2 high. That is in violation of all the applicable
3 safety standards.

4 Causation is a question of fact for the
5 jury. There is no evidence whatsoever to
6 indicate that this was an intentional act or
7 something of that nature. And in fact, my expert
8 has submitted an affidavit, Exhibit F, paragraph
9 32, wherein he states: If reasonable required
10 fall protection measures had been provided, then
11 the potential for plaintiff's fall from the roof
12 would have been significantly reduced, if not
13 eliminated.

14 Under the circumstances causation is a
15 question of fact for the jury. I am going to
16 take the Court's admonition seriously, and try
17 and keep my comments brief.

18 I know Your Honor has lengthy
19 experience on the bench. It's good to see you
20 back, by the way. It's been a number of years
21 since I have seen you.

22 This is a unique situation this case.
23 First off, we do have evidence of direct
24 negligence that has come up through discovery.
25 We made the request. Frankly, I think our

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 complaint as it is drafted could be read to
2 support a direct negligence claim. We used the
3 word "negligence" but caution to prevail, we
4 requested the opportunity to amend to address
5 that directly so there is no question about it.

6 All the cases cited by the Defendant,
7 there is no issue of direct negligence. So in
8 this case right there you have got something that
9 is unique. That is different, and that is not in
10 the cases.

11 The next aspect which I think is, in
12 fact, unique is that in this case the Defendants
13 hired an individual. The individual's name is
14 Larry Gill, to install this roofing membrane on
15 the roof that they had just constructed. And as
16 we set forth in our brief, and we cited to the
17 deposition at the time that the Defendant got Mr.
18 Gill an individual. He had no established
19 business. He had no employees. He had no
20 payroll. He had no insurance. He had no safety
21 program. He had nothing.

22 They hired this individual and as we
23 have alleged, and again in the brief supported
24 with deposition testimony and other evidence,
25 there is no written contract and Mr. Gill

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

1 basically said: I did whatever they told me to
2 do, the Defendant. So the fact of the matter is
3 Gill said: Look, I charged these guys less than
4 half than what an established business would have
5 charged them.

6 And our claim is really under those
7 circumstances that Mr. Gill isn't truly an
8 independent contractor as that term is used in
9 the case law. That really what he is, is he is
10 acting at the control and at the direction of the
11 Defendant.

12 And that bottom line is under the
13 unique facts of this case. The Defendant didn't
14 have a reasonable expectation that this
15 individual, Mr. Gill, was going to do anything in
16 regard to safety. That is totally unique from
17 all the cases that you read where the Defendant
18 hires someone, they hire an established company.
19 The company has a safety program, that the
20 company has employees and payroll and insurance.

21 Right now my client Mr. Velez is not
22 receiving worker's comp. There was no Worker's
23 Comp insurance. There is no medical. There is
24 no health. There is no anything. He is
25 receiving, basically we're paying for him. He is

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 on Social Security disability, and Medicaid.

2 That just points out the fact that
3 there was no reasonable expectation from the
4 Defendant that Mr. Gill was going to do anything
5 in regard to safety and if nothing else, the lack
6 of a written enforceable contract establishing
7 Mr. Gill's obligation or responsibilities
8 properly supports our claim that the defendants
9 were in complete control of everything that was
10 going on.

11 Mr. Gill admits that he says I did
12 whatever they told me to do because I wasn't
13 going to get paid if I didn't. Having enjoyed
14 the discount, if you will, the cheap price for
15 the work, the Defendant can't come in and wash
16 their hands and say: Oh, we had nothing to do
17 with this.

18 Because, again, the facts of the case
19 show that they had everything to do with it. And
20 in particular remember they removed the anchor
21 point for the safety devices.

22 The Court should recognize the unique
23 factual issues in this case, which really aren't
24 subject to summary dismissal. These are things
25 that should properly be argued to the fact

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 finders and let the jury decide this case based
2 on the merits.

3 And again, I challenge counsel or the
4 Court's research department. I have been doing
5 this kind of law for a long time, and I can't
6 find a case that is on point where the individual
7 that is retained to do the work has absolutely
8 nothing, no business, no payroll, no nothing, no
9 written contract and how they can ask for relief
10 as a matter of law in that ambiguous situation.

11 I just don't believe it's appropriate.
12 Thank you.

13 THE COURT: Thank you, counsel.

14 Brief response.

15 MR. MITCHELL: Mr. Shafer had utilized
16 Mr. Gill on prior occasions. This wasn't
17 somebody off the street. This is somebody that
18 he had used before and known that this guy was a
19 roofer since 1984.

20 He did take precautions that he deemed
21 necessary. That was his responsibility. The
22 fact that there is no written contract is
23 irrelevant. The fact that there is no insurance
24 is relevant to the fact that Mr. Velez is not
25 being paid by Mr. Gill's insurance. That is

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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1 unfortunate, but that does not shift liability.

2 The fact of the matter is Mr. Gill let
3 his insurance lapse. It would appear he had this
4 on prior occasions. Should they have checked his
5 certificate and made sure it was up to date?
6 Probably. Maybe they should have. But this was
7 not somebody unfamiliar to them. Somebody that
8 they had known for a very long time and had done
9 a lot of work on prior occasions.

10 As to Defendant controlling the work
11 that Mr. Gill did, I think his citation on page 4
12 of Mr. Fishback's response brief is right. He
13 asked Mr. Gill:

14 If something came up during the process
15 of the work that he wanted changed or done
16 differently, that was something you could
17 accommodate and you would simply adjust the
18 bill.

19 Answer: Yes, sir.

20 Your Honor that is no different than
21 any other owner. That is no different than
22 someone comes to your house and does work.

23 You want something changed, they are
24 going to change it if they can and, yes, they are
25 going to adjust the bill accordingly.

Exhibit 10 - Motion for Summary Disposition Hearing Transcript 6/4/2018

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So there is really nothing unique about this. It is unfortunate that Mr. Gill let his insurance lapse, and that is a tragic circumstance for everybody here.

However, it does not shift liability; does not make this unique in any way. Thank you Your Honor.

THE COURT: All right. Thank you gentlemen. I'll issue a written opinion.

Court will be in brief recess.

MR. FISHBACK: Thank you Your Honor.

MR. MITCHELL: Thank you Your Honor.

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

Exhibit 11

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the Estate of
JOSEPH DANIEL VELEZ, JR,
an incapacitated individual,

Plaintiff,

vs.

Case No. 2017-2389-NO

RICHARD SHAFER, KAREN SHAFER,
R. SHAFER BUILDERS, RICHARD N.
SHAFER, Trustee of Revocable Living
Trust Agreement dated 12/14/89;
KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89;

Defendants.

OPINION AND ORDER

Defendants Richard Shafer (Defendant Richard Shafer), Karen Shafer, Richard N. Shafer as trustee of revocable living trust agreement dated 12/14/89, Karen J. Shafer as trustee of revocable living trust agreement dated 12/14/89, and R. Shafer Builders ("Defendant R. Shafer Builders") (collectively the "Shafer Defendants") filed a motion for summary disposition. Plaintiff Susan Moore ("Plaintiff"), guardian and conservator of the Estate of Joseph Daniel Velez, Jr., an incapacitated individual, has filed a response in opposition to the motion. The Shafer Defendants filed a brief in support of their motion.

Factual and Procedural History

This action arises out of an incident that occurred on August 24, 2016 in which Joseph Daniel Velez, Jr. fell off a roof while working as a roofer on an addition to an

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

industrial building located at 151 Shafer Drive, Romeo, Michigan 48065 (the "Building"). The Building is owned by some or all of the following defendants: Defendant Richard Shafer; Karen Shafer; Richard N. Shafer, trustee of revocable living trust agreement dated 12/14/89; and Karen J. Shafer, trustee of revocable living trust agreement dated 12/14/89. Defendant Richard Shafer was also the landlord of the Building and owner of Defendant R. Shafer Builders.

Defendant Richard Shafer through his business Defendant R. Shafer Builders utilized its employees and hired outside contractors to build the addition to the Building. Once the addition was nearly complete, Defendant Richard Shafer through his business Defendant R. Shafer Builders hired an outside contractor, Lawrence Gill, to perform the roof construction. Mr. Gill did not have a formal business established, employees, payroll, or insurance. Instead, Mr. Gill hired "day laborers" and paid them a daily rate. Mr. Velez was hired by Mr. Gill. While performing work on the roof of the addition, Mr. Velez fell from the roof and was allegedly seriously injured. Plaintiff was appointed as Mr. Velez's guardian and conservator.

On July 3, 2017, Plaintiff filed her complaint on behalf of Mr. Velez alleging, *inter alia*, premises liability and liability pursuant to the common work area doctrine against the Shafer Defendants. On April 30, 2018, the Shafer Defendants filed the instant motion for summary disposition. On May 24, 2018, Plaintiff filed her response in opposition to the motion. The Shafer Defendants filed a reply brief in support of their motion on May 30, 2018. On June 4, 2018, the Court held a hearing in connection with the motion and took the matter under advisement.

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition*Standard of Review.*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

Arguments

In its motion, the Shafer Defendants contend they did not owe a duty to Mr. Velez because the danger of falling from the roof of the addition to the Building was open and obvious and no special aspects were present. The Shafer Defendants further aver that Plaintiff cannot establish the necessary elements of the common work area theory.

In response, Plaintiff argues that the Shafer Defendants maintained control over all aspects of the construction of the addition to the Building and created an unreasonably dangerous condition on the roof by removing the safety equipment anchors. Plaintiff further contends that the Shafer Defendants are liable under the common work area doctrine.

*Law and Analysis*Premises Liability

First, the Shafer Defendants contend that the danger of falling from the subject roof was open and obvious and Plaintiff has failed to establish any special aspects. To

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

prevail on a premises liability claim, a plaintiff must prove the elements of negligence: duty, breach, causation, and damages. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). It is undisputed that Mr. Velez was an invitee at the Building when he fell. “[A] premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by the dangerous condition on the land.” *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, absent special circumstances, this duty generally does not require the owner to protect an invitee from open and obvious dangers. *Id.* at 517.

Only special aspects “that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. *Id.* at 519. This “special aspects” exception to the open and obvious doctrine is a narrow one. *Hoffner v Lanctoe*, 492 Mich 450, 462; 821 NW2d 88 (2012). Michigan Courts have recognized two instances in which special aspects of an open and obvious danger may give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable. *Id.* at 463. In order for an open and obvious danger to be unreasonably dangerous, there must be something out of the ordinary or special about the danger in order for a premises possessor to be expected to anticipate harm from that condition. *Lugo*, 464 Mich at 525. Here, the parties agree that the danger of falling off the roof of the addition to the Building was open and obvious and avoidable. At dispute is whether the danger of falling off the subject roof was unreasonably dangerous.

The Shafer Defendants rely on *Perkoviq v Delcor Home-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2012) to support their argument that the subject roof was

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

not unreasonably dangerous. In *Perkoviq*, the plaintiff was injured when he slipped on ice that had formed on the roof of a partially constructed house during the course of his employment and fell approximately twenty feet to the ground. *Id.* at 12. At the time of his fall, Plaintiff was employed by a subcontractor on the project. *Id.* Plaintiff brought a premises liability claim against the owner/general contractor of the subdivision development. *Id.* The *Perkoviq* Court held that there was no question that the condition of the roof was open and obvious. *Id.* at 18. The *Perkoviq* Court further held that the "mere presence of ice, snow, or frost on a sloped roof generally does not create an unreasonably dangerous condition." *Id.* at 19-20. The Shafer Defendants contend that, like *Perkoviq*, the roof of the addition to the Building did not create an unreasonably dangerous condition. In fact, the Shafer Defendants argue, the roof in this case was even safer than the roof in *Perkoviq* since the roof in this case was flat and it was "an average summer day." See Shafer Defendants motion, Exhibit H, p. 42, Deposition transcript of Lawrence Gill.

In response, Plaintiff relies on *Woodbury v Bruckner* (On Remand), 248 Mich App 684; 650 NW2d 343 (2001) to argue that the roof of the addition to the Building was unreasonably dangerous. In *Woodbury*, the plaintiff tenant fell from an unguarded rooftop porch of a second story apartment. *Id.* at 685. The Court of Appeals held that the defendant had a duty to the plaintiff because even though the absence of a guardrail was an open and obvious condition known to plaintiff, a question of material fact existed as to whether the danger was unreasonably dangerous. *Id.* at 689.

Plaintiff further maintains that this case is differentiated from the facts of *Perkoviq*. In *Perkoviq*, the Court held that the roof was not unreasonably dangerous because "[i]n

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site.” *Perkoviq*, 466 Mich at 18. Plaintiff contends that here, the Shafer Defendants had every reason to foresee that Mr. Gill would not be able to use fall protection because the Shafer Defendants removed the anchor points for safety equipment from the roof. See Plaintiff’s response, Exhibit C, p. 30, Deposition transcript of Elmo Madden. Plaintiff further argues that the Shafer Defendants should have foreseen that Mr. Gill would not implement proper safety standards since Mr. Gill did not have an established business, employees, or a safety program. See Plaintiff’s response, Exhibit D, p. 29-30, Deposition transcript of Lawrence Gill.

Based on the above arguments, the Court finds that there is no question of fact that the condition of the roof of the addition to the Building was open and obvious, avoidable and not unreasonably dangerous. The Court is convinced that Plaintiff’s argument that the Shafer Defendants should have foreseen that Mr. Gill would not use fall protection or implement proper safety standards is without merit. As owner, the Shafer Defendants had no reason to foresee that the subject roof would be unreasonably dangerous, as the roof lacked any special aspects that would make it so the Shafer Defendants would expect that employees of Mr. Gill would fail to take necessary precautions to guard against the obvious danger of being on a roof. See *Perkoviq*, 466 Mich at 19. The Court further finds that the testimony presented by Plaintiff that anchors were removed by employees of Defendant Richard Shafer and/or Defendant R. Shafer Builders once they were finished with their portion of the work is irrelevant to whether Mr.

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

Gill would take necessary precautions to guard against any dangers of working on the roof. Therefore, the Court must grant the Shafer Defendants motion for summary disposition of Plaintiff's premises liability claim.

Common Work Area Doctrine

Next, the Shafer Defendants aver that the common work area doctrine does not apply to this case. In general, at common law, property owners and general contractors could not be held liable for the negligence of independent subcontractors and their employees. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48, 53; 684 NW2d 320 (2004). But in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), our Supreme Court modified the common law by establishing the common work area doctrine as an exception to the general rule of nonliability in cases involving construction projects.

To establish liability under the common work area doctrine, a plaintiff must prove that "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common area. *Ormsby*, 471 Mich at 54. A plaintiff's failure to satisfy any one of the elements of the common work area doctrine is fatal. *Id.* at 59. For "a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work." *Groncki v Detroit Edison Co*, 453 Mich 644, 663; 557 NW2d 289 (1996).

Here, the Shafer Defendants contend that Plaintiff cannot meet her burden to prove the third and fourth elements of the common work area doctrine. In regards to the third criteria, the Shafer Defendants argue that only six (6) workers were exposed to the

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

subject roof on the first day of the job and only three of those workers were working on the day of Mr. Velez's fall. See Shafer Defendants motion, Exhibit H, p. 11-12, Deposition transcript of Lawrence Gill. The Shafer Defendants rely on *Hughes v PMG Bldg, Inc*, 277 Mich App 1, 7; 574 NW2d 691 (1997), which held that four workers did not constitute a significant number of workmen. The *Hughes* Court compared its facts to *Plummer v Bechtel Constr Co*, 440 Mich 646, 651; NW2d 66 (1992), which involved a construction project involving 2,500 workers and a number of subcontractors.

In regards to criteria four, the Shafer Defendants claim that the roof to the addition of the Building was not a common work area because there were no other subcontractor employees other than Mr. Gill's workers working on the roof of the addition to the Building. See *Hughes*, 277 Mich App at 6. The Shafer Defendants argue that Plaintiff has not provided any evidence that any subcontractor other than Mr. Gill and his workers were exposed to the subject roof. See Shafer Defendants motion, Exhibit H, p. 12-13, Deposition transcript of Lawrence Gill.

In response to criteria three, Plaintiff asserts that there were at least eleven workers assigned to work on the subject roof at one time or another. Plaintiff alleges that three of those workers were direct employees and another worker was not a direct employee of the Shafer Defendants. Plaintiff further states that the other workers were not even employed by Mr. Gill, but were instead simply "day laborers". In regards to the fourth criteria, Plaintiff contends that the subject roof constituted a common work area because the Shafer Defendants workers, the seven other non-employee workers arranged by Mr. Gill, and a plumber all worked on the roof at some point. However, Plaintiff did not provide any evidence in support of these claims.

Exhibit 11 - *#88% Opinion and Order Granting Defendants' Motion for Summary Disposition

Based on the above evidence, the Court finds that Plaintiff has failed to create a question of material fact whether the danger of the roof of the addition to the Building created a high degree of risk to a significant number of workmen in a common area. Plaintiff did not provide any evidence that more than six workers and Mr. Gill were exposed to the risk of being on the roof of the addition to the Building or that two or more subcontractors eventually worked on the subject roof. Therefore, the Court must grant the Shafer Defendants motion for summary disposition as to Plaintiff's claim regarding the common work area doctrine.

Lastly, in her response to the Shafer Defendants motion, Plaintiff requests the opportunity to amend her pleadings to include a claim of negligence per MCR 2.118(C). Pursuant to MCR 2.118(C)(1), "amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment." Therefore, the Court finds that this issue is better served by Plaintiff filing a motion to amend her pleading. See MCR 2.118(C)(1).

Conclusion

For the reasons stated above, the Safer Defendants motion for summary disposition is GRANTED. This Opinion and Order resolves the last pending claim and CLOSES this case. MCR 2.602(A)(3).

IT IS SO ORDERED.


JAMES M. BIERNAT, SR.
In Absence of RICHARD L. CARETTI
Circuit Court Judge

Dated: June 6, 2018

cc: George T. Fishback, Attorney for Plaintiff
Richard M. Mitchell, Attorney for Shafer Defendants

Exhibit 12 - Plaintiff's Motion for Reconsideration

Exhibit 12

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Exhibit 12 - Plaintiff's Motion for Reconsideration

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, as GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR,
an Incapacitated Individual,

Case No.: 2017-002389-NO
Hon. Richard L. Caretti
(586) 469-5137

Plaintiff,

vs

RICHARD SHAFER, KAREN SHAFER,
R SHAFER BUILDERS, RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement
dated 12/14/89; KAREN J. SHAFER, Trustee of
Revocable Living Trust Agreement dated 12/14/89;

GEORGE T. FISHBACK (P29763)
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207
(313) 965-3464
(313) 965-4315 - FAX
gtfishback@sachswaldman.com

RICHARD M. MITCHELL (P45257)
MADDIN, HAUSER, ROCH
& HELLER, P.C.
Attorneys for Defendants Shafers
28400 Northwestern Highway
Southfield, MI 48034
(248) 827-1875
rmitchell@maddinhauser.com

PLAINTIFF'S MOTION FOR RECONSIDERATION

NOW COMES Plaintiff Susan Moore, as Guardian and Conservator of the Estate of Joseph Daniel Velez, Jr., an Incapacitated Individual, by and through her attorneys Sachs Waldman, P.C., and in support of her Motion for Reconsideration states as follows:

1. This case arises out of an incident that occurred on August 24, 2016, when Plaintiff's ward, Joseph Velez, now a Legally Incapacitated Individual, fell off the

Exhibit 12 - Plaintiff's Motion for Reconsideration

unprotected edge of a 20 foot high roof on a construction site and suffered serious and permanent injuries.

2. Defendants filed a Motion for Summary Disposition, seeking dismissal of all counts of Plaintiff's Complaint under MCR 2.116(C)(10).

3. This Court granted Defendants' Motion for Summary Disposition in an Opinion and Order entered on June 11, 2018.

4. MCR 2.119(F) provides that a party may file a Motion for Rehearing or Reconsideration of a decision on a motion within 21 days after entry of an order deciding the motion.

5. This Court, in its Opinion and Order, made a palpable error when it decided the issue of foreseeability with regard to Plaintiff's premises liability claim as a matter of law, when a genuine issue of material fact exists and, moreover, reasonable foreseeability is generally a fact question for the jury.

6. This Court made an additional palpable error when it erroneously stated that Plaintiff did not present any evidence to support her claims that the subject roof constituted a common work area, when Plaintiff had provided evidence in the form of deposition testimony attached as Exhibits to her Response.

Exhibit 12 - Plaintiff's Motion for Reconsideration

WHEREFORE, Plaintiff respectfully requests that this Court grant her Motion for Reconsideration.

Respectfully submitted,

SACHS WALDMAN, Professional Corporation,

BY: /s/ George T. Fishback
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207-4160
313/965-3464
gtfishback@sachswaldman.com

Dated: June 21, 2018

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

MCR 2.119(F) governs motions for reconsideration and its language gives a trial court wide latitude to correct decisions.

Generally, and **without restricting the discretion of the court**, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must show a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.
(Emphasis added)

Michigan appellate courts have held that MCR 2.119(F) provides trial courts with broad discretionary authority to reconsider rulings, even when the courts revisit the same issue to correct a previous mistake. In *Kokx v. Bylenga*, 241 Mich. App. 655; 617 N.W.2d 368, (2000), the Michigan Court of Appeals rejected a defendant's argument that the circuit court erred in reconsidering its decision to deny summary disposition because no new evidence or argument was presented.

Document received by the MI Macomb 16th Circuit Court.

Exhibit 12 - Plaintiff's Motion for Reconsideration

A court's decision to grant a motion for reconsideration is an exercise of discretion. Thus, "if a trial court wants to give a second chance' to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion."

The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties. (*Citations omitted, Emphasis added*)¹

See also *Bakian v. Nat'l City Bank (In re Estate of Moukalled)*, 269 Mich. App. 708, 714; 714 N.W.2d 400 (2006) "The plain language of the court rule does not categorically prohibit a trial court from granting a motion for reconsideration even if the motion presents the same issues initially argued and decided."

This Court correctly pointed out on Page 3 of its Opinion: "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) Indeed, the issue of reasonable foreseeability is generally a question of fact for the jury's decision. "[R]easonableness, as foreseeability, is normally a question for the jury to determine." *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 407; 224 NW2d 843 (1975)

Given the record evidence presented by Plaintiff regarding Lawrence Gill's lack of an established business organization, lack of a safety program and his unreliability as a contractor, the issue of the foreseeability of Mr. Gill's failure to implement reasonable fall protection safety measures should properly be submitted for a jury's consideration. Indeed, Plaintiff quoted Mr. Gill's testimony that by hiring him rather than an established contractor, Defendants realized substantial cost savings. The reasonable inference is

¹ Kokx, *supra* has more recently been cited for this proposition in *King v. Oakland County Prosecutor*, 303 Mich. App. 222; 842 N.W.2d 403 (2013).

Exhibit 12 - Plaintiff's Motion for Reconsideration

that Defendants fully realized the implication for worker safety of their decision to hire Mr. Gill “on the cheap.” And there was this remarkable testimony from Gill, saying that he “had talked to particular Shafer, and he had said that he can’t pay me until we had a company that was licensed and insured.” (quoted in Plaintiff’s brief on p. 12) Defendants knew what they were getting in hiring Gill. Furthermore, Defendants were not in an ordinary, arm’s length relationship with Gill—they retained control of the roofing project and could see for themselves the lack of safety measures.

In her Response, Plaintiff submitted that the facts of the instant case are distinguishable from those instances when a builder hires a reliable contractor, which will take responsibility for the safety of its employees. Recall that here, Mr. Gill had no employees—all of his workers were “day laborers,” paid as independent contractors. Thus, the instant case is unlike a case where, for instance, a homebuilder hires a reliable contractor and a worker is injured on the job. The distinguishing factor, Plaintiff argued, is that the Shafer Defendants hired a “cut-rate” or “bargain basement” contractor with no established business, employees, or safety program. In addition, Defendants actually removed the anchor on the roof for fall protection. Therefore, a genuine issue of fact remains that it was reasonably foreseeable that Mr. Gill, the “outside” contractor hired by Defendants, would fail in his responsibility to provide reasonably safe working conditions for his workers, none of whom were actually his “employees.” The reasonably foreseeable absence of safety measures made the roof unreasonably dangerous—an exception to the open and obvious doctrine. For the

Exhibit 12 - Plaintiff's Motion for Reconsideration

same reason—the absence of fall protection—our Supreme Court in *Funk*¹ found the construction project it examined to be unreasonably dangerous. This issue of reasonably foreseeable consequences should be submitted to a jury.

The Court in its Opinion completely overlooks that Defendants' retained complete control of the work project. Defendants were not like a homebuilder which hires a contractor to put on a roof, for instance. Whatever work Larry Gill did was subject to Shafer's approval and Defendants retained control of the building of the project, as repeatedly noted in Plaintiff's brief—with citations to the relevant deposition testimony.

With regard to the issue of whether the subject roof constituted a common work area, the Court erroneously stated: "Plaintiff did not provide any evidence in support of these claims." (page 8) On the contrary, Plaintiff was quite specific in citing to record evidence in support of the roof being a common work area, as follows:

(1) The presence of the Gill "day laborers" on the roof is undisputed and mentioned numerous times by Larry Gill in his testimony, attached as Exhibit D. Specifically, Plaintiff cited to Gill's testimony at p. 11 of his deposition, for his testimony that seven of his day laborers were on the roof. The simple fact that none of the workers were anyone's "employee" makes them all outside contractors—which brings them within the fundamental purpose of the common work area doctrine.

(2) In his deposition, cited in Plaintiff's brief, Defendants' employee, Elmo Madden, described the role of the Shafer workers in putting up the roof. (Page 3 of Plaintiff's brief and accompanying Exhibit C, pp. 16-19) One of these workers, Tom Shafer, was actually a contractor.

¹ *Funk v General Motors Corp.*, 392 Mich 91; 220 NW2d 641 (1974)

Exhibit 12 - Plaintiff's Motion for Reconsideration

(3) While not specifically cited in Plaintiff's brief, the testimony of Elmo Madden, attached in its entirety as Exhibit C, establishes the presence of the plumber on the roof at p. 26 and again at pp. 42-43, lines 21-2. (Plaintiff at pp. 16-17 of her Brief noted the presence of the plumber on the roof)

Thus, Plaintiff presented evidence that employees of at least 3 different contractors and 8 outside contract workers were on the subject roof, although not all at the same time. According to Michigan case law cited in Plaintiff's brief, the presence of different contractors at different times is sufficient to establish a common work area.

Again, the fundamental purpose of the common work area doctrine, clearly stated by our Supreme Court in *Funk*, is to hold the controlling authority responsible for the implementation of reasonable safety measures, where, as here, it was clearly foreseeable that Mr. Gill did not have the means to do so, nor did he even have an established business organization or safety program to accomplish this. Plaintiff's expert witness' affidavit clearly supports this claim. (Plaintiff expert's Affidavit, Exhibit F, especially Paragraph 21) Thus, it is a question of fact, properly reserved for determination by the jury.

Exhibit 12 - Plaintiff's Motion for Reconsideration

IN LIGHT OF THE FOREGOING, Plaintiff respectfully submits that this Court should properly grant her Motion for Reconsideration.

Respectfully submitted,

SACHS WALDMAN, Professional Corporation,

BY: */s/ George T. Fishback*
GEORGE T. FISHBACK (P29763)
Attorney for Plaintiff
2211 East Jefferson Avenue
Suite #200
Detroit, Michigan 48207-4160
313/965-3464
gtfishback@sachswaldman.com

Dated: June 21, 2018

Document received by the MI Macomb 16th Circuit Court.

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Exhibit 13

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR., an
Incapacitated individual,
Plaintiff,

v

Case No. 17-2389-NO
Hon. Richard L. Caretti

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89; HENSLEY
MFG, INC., a Michigan corporation,
Defendants.

SACHS WALDMAN, P.C.
By: George T. Fishback (P29763)
2211 East Jefferson Avenue, Suite 200
Detroit, Michigan 48207
(313) 965-3464 / (313) 965-4315 fax
gtfishback@sachswaldman.com
Attorneys for Plaintiff

MADDIN, HAUSER, ROTH & HELLER, P.C.
By: Richard M Mitchell (P45257)
Jesse L. Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhausser.com
Attorneys for Shafer Defendants

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT

Defendants, Richard Shafer, Karen Shafer, R Shafer Builders, Richard N. Shafer as Trustee and
Karen J. Shafer as Trustee (collectively, 'Shafer Defendants'), by and through their attorneys, Maddin,
Hauser, Roth & Heller, P.C., state as follows for their Response in Opposition to Plaintiff's Motion for
Reconsideration:

RESPONSE TO MOTION

1. The Shafer Defendants admit only that Plaintiff was an experienced roofer who
inexplicably fell from an ordinary roof on August 24, 2016 and suffered injuries. No evidence whatsoever
was revealed in the course of discovery as to the cause of this fall.

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

2. The Shafer Defendants admit these allegations and further state that they filed their Motion for Summary Disposition after the conclusion of an extensive discovery period.

3. The Shafer Defendants admit these allegations and further state that the Court's Opinion and Order is absolutely correct.

4. The Shafer Defendants deny that relief under MCR 2.119(F) is warranted.

5. The Shafer Defendants deny these allegations. The Court was correct that the flat roof from which Joseph Velez fell, which was just like dozens of other roofs on which the experienced Velez and his roofing subcontractor employer Larry Gill had previously worked, was "open and obvious, avoidable and not unreasonably dangerous." Opinion and Order at pp 6 – 7.

6. The Shafer Defendants deny these allegations. The Court was correct that there is no evidence that a significant number of workers of multiple subcontractors in different construction trades were exposed to the same risk as Velez of working on a roof with allegedly inadequate fall protection. Opinion and Order at 7 – 9.

WHEREFORE, the Shafer Defendants ask the Court to deny Plaintiff's Motion.

Respectfully submitted,

MADDIN, HAUSER, ROTH & HELLER, P.C.

By: /s/ Richard M Mitchell
Richard M Mitchell (P45257)
Jesse L. Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
mitchell@maddinhauser.com
Attorneys for Shafer Defendants

DATED: July 27, 2018

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the ESTATE OF
JOSEPH DANIEL VELEZ, JR., an
Incapacitated individual,
Plaintiff,

Case No. 17-2389-NO
Hon. Richard L. Caretti

V

RICHARD SHAFER; KAREN SHAFER;
R SHAFER BUILDERS; RICHARD N. SHAFER,
Trustee of Revocable Living Trust Agreement dated
12/14/89; KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89; HENSLEY
MFG, INC., a Michigan corporation,
Defendants.

SACHS WALDMAN, P.C.
By: George T. Fishback (P29763)
2211 East Jefferson Avenue, Suite 200
Detroit, Michigan 48207
(313) 965-3464 / (313) 965-4315 fax
gtfishback@sachswaldman.com
Attorneys for Plaintiff

MADDIN, HAUSER, ROTH & HELLER, P.C.
By: Richard M Mitchell (P45257)
Jesse L Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhausser.com
Attorneys for Shafer Defendants

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION

I. Legal standard.

"A motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Instead, the moving party must demonstrate "a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id.* A "palpable" error is an error "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Luckow Estate v. Luckow*, 291 Mich App 417, 426 (2011), quotation marks and citation omitted. In general, a court will not grant a motion for reconsideration that presents the same issues that were

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

already decided by the court. MCR 2.119(F)(3). There is absolutely no “palpable error” by which this court was misled. The Court was presented with the facts developed through extensive discovery, facts which were known to the parties for several months, and made its decision accordingly.

II. The Court was absolutely correct to dismiss Plaintiff’s premises liability claims on the basis of the Supreme Court’s decision in *Perkoviq*.

Plaintiff does not present any new evidence or argument as to why the flat roof from which Joseph Velez fell, which was just like dozens and dozens of other roofs on which the experienced Velez and his roofing subcontractor employer Larry Gill had previously worked, was unreasonably dangerous. Rather, Plaintiff makes the exact same argument originally presented to the court in the briefs and at the hearing of the motion – that the roof was unreasonably dangerous for the sole reason that Gill was not an “established” contractor – that the Court already rejected as not creating a material issue of fact. See Opinion and Order at pp 3 – 7. The Court correctly reached this conclusion under *Perkoviq v Delcor Home-Lake Shore Pointe, Ltd*, 466 Mich 11 (2012), in which the Supreme Court affirmed summary disposition in a case much like this one.

In *Perkoviq*, the plaintiff was an employee of a subcontractor that was hired to paint the upper level exterior of a house under construction. The plaintiff fell from the roof, and alleged it was because the defendant, who was the property owner and general contractor, did not ensure there was a fall protection system. After finding that the conditions of the roof were open and obvious, the Court explained: “To avoid summary disposition on this type of claim, a plaintiff must present evidence of ‘special aspects’ of the condition that differentiate it from the typical sloped rooftop containing ice, snow, or frost.” *Id.* at 20. In other words, *Perkoviq* makes clear that the risk of working at heights without fall protection equipment, even in icy conditions on a sloped roof, is insufficient as a matter of law to satisfy the narrow special-aspects exception to the open-and-obvious doctrine.

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

Plaintiff attempts to distinguish Perkoviq by arguing that the flat, dry roof off of which he fell was more unreasonably dangerous than the icy, sloped roof that did not have any fall protection system in Perkoviq, because the Shafer Defendants should have foreseen that Larry Gill and his workers would not take adequate safety measures because Gill was not an “established” contractor. The Court correctly found this argument to have no merit whatsoever. Opinion and Order at pp 6 – 7. The record evidence is clear that Gill is not some novice roofer who cannot have been expected to know or implement appropriate safety measures. On the contrary, he is an extremely experienced roofer, having trained and begun working in the field 34 years ago. See Deposition of Larry Gill (attached to Shafer Defendants’ Motion for Summary Disposition as Exhibit H) at pp 5 – 6. During his seven-year-long apprenticeship, he attended classes through Roofers Local 149 in which he was taught roofing, workplace safety and related topics. See Gill Dep. at 5 – 7. He earned the status of journeyman roofer in 1991. See Gill Dep. at p 7. He testified that in his career, he has worked on hundreds of roofing jobs that were similar to the job at issue. See Gill Dep. at p 10. He testified that he first began working on roofing with Mr. Velez in the year 2000, since which time they have worked on approximately 60 to 80 roofing jobs together that were just like the job at issue. See Gill Dep. at 6 – 10. Gill testified that he also had previously performed roofing work for the Shafer Defendants, before the job at issue. See Gill Dep. at p 9. In light of Gill’s extensive training and experience, and given the fact that he had satisfactorily performed roofing work for the Shafer Defendants on numerous occasions in the past, the Shafer Defendants had every reason to expect Larry Gill would perform the job at issue satisfactorily, including taking adequate safety measures. Furthermore, taking adequate safety measures was Gill’s duty under Michigan law,¹ and there is not a shred of evidence that the Shafer Defendants foresaw or should have foreseen that Gill would not comply with the law.

¹ In Michigan, as a matter of public policy, subcontractors on a job site have a duty to ensure the site is safe for their workers. *Latham v Barton Malow Co*, 480 Mich 105, 112 (2008); *Hughes v PMG Building, Inc*, 227 Mich App 1, 6 (1997).

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

Plaintiff argues that the Shafer Defendants should have anticipated that Gill would not take adequate safety measures because his billing rates were substantially lower than an “established” contractor. This is a complete non sequitur. In fact, the fall protection system Gill actually used – having Velez serve as the “holler man” who would alert co-workers when they were getting close to the edge of the roof – likely cost Gill just as much if not more money (i.e., Velez’s wages) than simply using an anchor point and safety ropes. See Gill Dep. at p 31. This cannot possibly have reasonably given the Shafer Defendants any clue about the type of fall protection he might use.

As the Court correctly concluded, the Shafer Defendants, just like the defendant in *Perkoviq*, “had no reason to foresee that the subject roof would be unreasonably dangerous, as the roof lacked any special aspects that would make it so the Shafer Defendants would expect that employees of Mr. Gill would fail to take necessary precautions to guard against the obvious danger of being on a roof.” Opinion and Order at pp 6 – 7, citing *Perkoviq*, 466 Mich at 19. As a matter of law, “the condition of the roof of the addition to the Building was open and obvious, avoidable and not unreasonably dangerous,” and Plaintiff’s premises liability claims were correctly dismissed. Opinion and Order at pp 6 – 7.

III. The Court was correct that Plaintiff’s common work area theory fails as a matter of law.

In the Court’s Opinion and Order, it rightly found that Plaintiff failed to create a question of material fact as to whether a significant number of workers of at least two subcontractors were exposed to the same risk as Velez of working on the roof with allegedly inadequate fall protection. Opinion and Order at 7 – 9. Plaintiff does not present any new argument as to why her common work area claims should have survived summary disposition. She merely reargues that Shafer’s own construction workers worked on the roof, that Gill’s workers were contract workers not employees, and that there also was a plumber on the roof. None of these issues create a question of fact, as the Court already determined. These facts do not demonstrate that the court was misled in any way. They were presented to the court, the court considered them, and ruled accordingly.

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

First of all, Plaintiff simply ignores that the common work area doctrine only applies in cases “involving very large construction sites.” *Smith v BREA Property Management of Michigan LLC*, 490 Fed Appx 682, 684 (CA 6, 2012) (citing *Funk*, 392 Mich at 110). In the Supreme Court’s *Funk* case, for example, liability was only imposed on the general contractor because the plaintiff fell from “a highly visible superstructure that was part of the common work area... and posed a risk to thousands of other workers.” *Hughes*, 227 Mich App at 7-8, citing *Funk v General Motors*, 392 Mich 91 (1974). See also *Plummer v Bechtel Constr Co*, 440 Mich 646, 651 (1992) (the plaintiff fell from an interconnecting catwalk/platform system at a construction project involving 2,500 workers and a number of subcontractors). Specifically, the common work area exception to the general no-liability rule applies only where the subject risk is posed to a (1) significant number of workers of (2) multiple subcontractors in different construction trades. *Latham*, 480 Mich at 121.

Plaintiff argues that Shafer’s own construction workers also worked near the top of the addition, albeit prior to the roofing work performed by Gill’s team. But there is no dispute that Shafer’s workers used a safety harness and rope, nor that those safety measures were insufficient. See Deposition of Mark Allison (attached to Shafer Defendants’ Motion for Summary Disposition as Exhibit E) at p 20; Deposition of Thomas Shafer (attached to Shafer Defendants’ Motion for Summary Disposition as Exhibit F) at p 14; Deposition of Elmo Madden (attached to Shafer Defendants’ Motion for Summary Disposition as Exhibit G) at pp 26, 29. Thus, they were not exposed to the same risk as Gill’s team, of working on a roof with allegedly inadequate fall protection equipment.

In addition, Shafer’s construction workers worked directly for Shafer, so they would not satisfy the requirement that multiple subcontractors be present in any event. As discussed, the narrow common work area doctrine applies only to risks posed to subcontractors and their workers, not to risks posed to the general contractor’s own workers. See *Funk v General Motors Co*, 392 Mich 91, 104; 220 NW2d 641 (1974). This is because ordinarily “[t]he immediate employer of a construction worker... is immediately

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

responsible for job safety.” Id. at 102. In cases “involving very large construction sites,” however, the common work area exception can apply to trigger responsibility on the part of the general contractor. Smith, 490 Fed Appx at 684, citing Funk, 392 Mich at 110. The policy supporting this exception is that on large construction sites, many different subcontractors may be exposed to the same hazard, and the entity in the best position to implement and coordinate job safety is the general contractor. Id. This policy reason does not apply to risks posed to the general contractor’s own workers, for whose job safety the general contractor is already immediately responsible. Thus, Shafer’s own construction workers are irrelevant to the common work area analysis in this case.

Plaintiff also argues that one plumber worked near the top of the addition at the same time as Shafer’s own construction workers, prior to the roofing work. But there is absolutely no evidence that the plumber failed to take appropriate safety measures. In fact, the evidence is that Shafer’s temporary anchor point to which the plumber could attach his safety harness and rope was still functional at the time the plumber performed his work. See Madden Dep. at pp 29 – 30. Thus, there is no evidence that any workers of any other subcontractor were exposed to the same risk as Gill’s team, of working on a roof with allegedly inadequate fall protection equipment.

Plaintiff also argues that Gill’s roofers were contract workers and not his employees. But it is hard to see how that helps Plaintiff prove that a significant number of workers of multiple subcontractors in different construction trades were exposed to the same risk. It is not disputed that Gill had only five workers with him on the first day of the job, and only three of whom were working on the second day when Velez fell. See Gill Dep. at 39 – 41. The Supreme Court has held that six workers is insufficient as a matter of law. Alderman v JC Dev Communities, LLC, 486 Mich 906 (2010). Nor, of course, could Gill’s team of roofers alone satisfy the requirement that workers of multiple subcontractors in different construction trades be present.

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

Rather, the Court was absolutely correct that, as a matter of law, the record evidence does not show that a (1) significant number of workers of (2) multiple subcontractors in different construction trades were exposed to the same risk as Velez, either of which is a sufficient reason to dismiss Plaintiff's common work area claims.

IV. Even if the Court erred (it did not), any error was harmless because Plaintiff failed to establish causation, which is fatal to all of her claims.

The Shafer Defendants argued in their Motion for Summary Disposition that Plaintiff relies on impermissible speculation in an effort to prove causation. The Court did not reach this issue because it rightly dismissed Plaintiff's premises liability and common work area claims as described above. But it is another reason why the Court reached the correct result.

As the Michigan Supreme Court noted in *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004), “[p]roximate cause’ is a legal term of art that incorporates both cause in fact and legal (or ‘proximate’) cause.” Like any other tort plaintiff, Plaintiff must prove “cause in fact” by “reasonable inference,” and not by “speculation” and “impermissible conjecture.” See *Pontiac School District v Miller Canfield Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997). Quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the Pontiac School court stated:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [Pontiac School, 221 Mich App at 615; citations omitted.]

Here, Plaintiff's claims against the Shafer Defendants are premised on a *res ipsa loquitur* theory: Velez fell from a roof, so the Shafer Defendants must be responsible. There is not a shred of evidence, however, as to why he actually fell. Velez is now incompetent to give testimony, and he apparently has no recollection of the fall. Gill testified that he did not see Velez fall, he does not know how Velez fell, and

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

nobody to his knowledge has any idea how Velez fell. See Gill Dep. at p 14. Nor were there any other witnesses to the fall. In fact, despite extensive discovery, there has been absolutely no evidence whatsoever as to what caused Velez's fall. But there is no way Plaintiff can prove his premises liability or common work area claims against the Shafer Defendants with no evidence as to why and how Velez actually fell. Perhaps he would have fallen no matter what safety measures were taken. Perhaps he jumped from the roof. Plaintiff may argue that she will rely on her hired expert to provide evidence of causation. But "there must be facts in evidence to support the opinion testimony of an expert" for the opinion to be reliable under MRE 702. Skinner, 445 Mich 153, 173 (1994). Here, where Plaintiff's expert's opinion is not based on any fact in evidence as to why Velez fell, the opinion is inadmissible under MRE 702. Thus, all of Plaintiff's claims against the Shafer Defendants necessarily rely on impermissible speculation. For all of these reasons, Plaintiff's Motion for Reconsideration should be denied.

WHEREFORE, the Shafer Defendants ask the Court to deny Plaintiff's Motion.

Respectfully submitted,

MADDIN, HAUSER, ROTH & HELLER, P.C.

By: /s/ Richard M Mitchell
Richard M Mitchell (P45257)
Jesse L Roth (P78814)
28400 Northwestern Hwy., 2nd Floor
Southfield, MI 48034
(248) 827-1875 / (248) 359-6175 fax
rmitchell@maddinhauser.com
Attorneys for Shafer Defendants

DATED: July 27, 2018

Exhibit 13 - Defendants' Response to Plaintiff's Motion for Reconsideration

PROOF OF SERVICE

The undersigned states that on the 27th day of July, 2018 she served a copy of the Defendants Response in Opposition to Plaintiff's Motion for Reconsideration, Brief in Support and this Proof of Service with the Clerk of the Court using the electronic filing system, which will send notification of such filing to all counsel of record.

I declare that the statements above are true to the best of my information, knowledge and belief.

/s/ Jill M Stem

Jill M Stem

Exhibit 14

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

SUSAN MOORE, Guardian and
Conservator, et al,

Plaintiff,

vs.

Case No. 17-2389 NO

RICHARD SHAFER, ET AL,

Defendant.

PROCEEDINGS

BEFORE THE HONORABLE RICHARD CARETTI, JUDGE

Mount Clemens, Michigan - August 6, 2018

APPEARANCES:

For the Plaintiff: George T. Fishback-P29763
Sachs Waldman PC
2211 E Jefferson Ave Ste 200
Detroit, MI 48207-4160

For the Defendant: Richard M. Mitchell-P45257
Maddin Hauser Roth & Heller PC
28400 Northwestern Hwy Ste 300
Southfield, MI 48034-8348

Deborah J. Doyle, RPR, CSR 2179
Official Court Reporter
PO BOX 463147
Mount Clemens, MI 48043
(586) 477-0099

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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TABLE OF CONTENTS

Page

WITNESSES:

(No witnesses offered)

EXHIBITS:

Received

(No exhibits offered)

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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Mount Clemens, Michigan
August 6, 2018
At about 9:08 a.m.

- - -

(REPORTER'S NOTE: "Indiscernible" means a word or words were not heard well enough to be able to discern a proper interpretation either because of shuffling of papers, or the speaker did not talk loud enough, or was not picked up by the microphones.)

(Court and Counsel present.).

THE CLERK: Susan Moore versus Richard Shafer.

MR. FISHBACK: Ready.

THE COURT: Your appearances.

MR. FISHBACK: Good morning, George Fishback on behalf of the Plaintiff.

MR. MITCHELL: Good morning, Richard Mitchell on behalf of the defendant.

THE COURT: Good morning to you both. You may proceed.

MR. FISHBACK: We had two motions,

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

1 Your Honor. Motion for to amend and a motion for
2 rehearing. Does the Court have a preference
3 which we address first.

4 MR. MITCHELL: Your Honor, I believe
5 we already heard the motion to amend.

6 THE COURT: Pardon me.

7 MR. MITCHELL: I believe we already
8 argued the motion to amend. You took it under
9 advisement.

10 THE COURT: Did I indicate that oral
11 argument would we allowed and did I allow --

12 Whose motion is it? Plaintiff?

13 MR. FISHBACK: Yes, both are. We
14 were here last --

15 THE COURT: On the motion for
16 reconsideration did I set a date and allow
17 defendant to file a response.

18 MR. FISHBACK: Yes.

19 THE COURT: When did we do that.

20 MR. FISHBACK: We were here last on
21 July 2nd. And that was the date that you took
22 the motion to amend under advisement.

23 I filed --

24 The motion for rehearing had been filed
25 and at that point you told Mr. Mitchell to submit

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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1 a response, and set both matters for this morning
2 along with a settlement conference.

3 THE COURT: I'll see you in chambers
4 at the first break, and we'll see where we go
5 from there.

6 MR. MITCHELL: Thank you, Your Honor.

7 MR. FISHBACK: Thank you, Your Honor.

8 (Court in recess).

9 (Court back in session)

10 THE CLERK: Recall Moore versus Shafer.

11 MR. FISHBACK: Ready.

12 THE COURT: Gentlemen, I already have
13 your appearances.

14 This is your motion, Mr. Fishback.
15 Please proceed.

16 MR. FISHBACK: Yes, Your Honor. The
17 first motion was the Plaintiff's motion to amend.
18 We were here before on July 2nd and the Court
19 took it under advisement. Anything I have to say
20 today would be a repetition of what I said
21 before.

22 THE COURT: Let me interrupt you
23 though. It was my understanding --

24 Let's see. That you filed it after
25 summary disposition had already been granted; is

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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that right.

MR. FISHBACK: It is. So --

THE COURT: How did you argue it then.

MR. FISHBACK: First off, we raised the request to amend in our response to the motion for summary disposition, pages two and 18 of our brief.

And in the order granting the summary disposition at page 9 the Court said in regard to our request to amend, quote:

Therefore the Court finds that this issue is better served by plaintiff filing a motion to amend her pleadings.

So the subsequent motion was really kind of a tag along to the issue that we raised and addressed in the summary disposition response.

But in particular, was in response to the Court's directive that we would be better served by filing a motion to amend.

THE COURT: Wouldn't you agree it is procedurally deficient to file a motion to amend on a dismissed case.

MR. FISHBACK: Well, the order had not been entered at that point. So technically

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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1 it wasn't dismissed, and technically we raised
2 the request, which is properly considered by the
3 Court under MCR 2.116, parens I.

4 THE COURT: I thought it was though.
5 I thought the Court issued its opinion on June 7.
6 And you filed your motion to amend on June 21st.

7 MR. FISHBACK: I stand corrected.

8 THE COURT: All right. I mean what is
9 your view on the motion to amend, Mr. Mitchell.

10 MR. MITCHELL: My take is that the
11 Court was essentially saying that wasn't the
12 right way to raise that. It was a summary
13 disposition motion. If you wanted to amend, you
14 should have filed a motion to amend. I don't
15 really having anything more to add.

16 THE COURT: I mean, I'm firmly of the
17 view it is procedurally deficient. And that --

18 Well, I don't know what was in the
19 visiting Judge's mind when he suggested the
20 motion to amend and then granted summary
21 disposition.

22 So your current motion to amend is
23 denied.

24 MR. FISHBACK: Thank you.

25 THE COURT: Please proceed with the

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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motion for reconsideration.

MR. FISHBACK: The motion for reconsideration, Your Honor, is just --

Get right to the crux of the matter. We're not presenting anything new, anything different. We are basically --

The visiting judge the Court simply got it wrong. That in this case there are two issues, one is the foreseeability of the conduct of the nonparty at fault, Mr. Gill. And in particular we have argued initially in our response to the summary disposition and in our motion for rehearing that it was imminently foreseeable that Mr. Gill would not use required fall protection for safety devices or measures.

We cited the numerous fact that were produced through discovery that establish why it was foreseeable that he would not comply with the MIOSHA safety regulations and whatnot.

The only thing I'm going to add is that the facts of this case are distinguishable from all of the case law on this point where property owner or general contractor is dealing with an established business, and under those circumstances an established contractor, the

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

RECEIVED by MSC 3/1/2020 12:39:34 PM

1 property owner and general contractor has a
2 reasonable basis to believe that an independent
3 contractor will comply with the safety
4 regulations and whatnot.

5 We showed pretty much the exact
6 opposite in this case and where the individual
7 Mr. Gill had no established business, no payroll,
8 no employees, no insurance, no nothing, he was
9 running this operation out of his pocket. And
10 under those circumstances we believe the
11 foreseeability of his lack of initiation of any
12 kind of reasonable required safety protocol was a
13 question of fact for the jury. That was number
14 one.

15 And then a separate issue was common
16 work area. And, again, we're not raising
17 anything new here. What we have is a case
18 whereas a policy, the Defendant as the owner of
19 the promise, the builder, the constructor of the
20 roof and the general contractor for the addition
21 that was being built is in the best position to
22 insure that safety measures be implemented in a
23 common work area.

24 Why is this roof a common work area?
25 Well, we have established through discovery that

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

RECEIVED by MSC 3/1/2020 12:39:34 PM

1 I believe minimally nine different individuals,
2 contractors were (indiscernible) employees were
3 working on the roof and were exposed to the
4 potential of falling off of a 20 foot roof.

5 And that under those circumstances,
6 that we have satisfied the test under the common
7 work area that to establish multiple contractors
8 exposing numerous workers to a recognized readily
9 observable and avoidable danger.

10 Again, I'm just be repeating myself at
11 this point and it all has been briefed.

12 THE COURT: I read it in detail.

13 Mr. Mitchell.

14 MR. MITCHELL: Your Honor, I simply
15 say that there was no palpable error here. The
16 party and the Court were not mislead. It was
17 extensive briefing, extensive argument and then
18 the Court took it under advisement; carefully
19 considered a very full record and issued a
20 written opinion.

21 I think that there was no error and
22 there was no rush to judgment.

23 I will just note for the record as far
24 as the attempt to distinguish this case, it is
25 really intent to distinguish it from Perkoviq

Exhibit 14 - Motion for Reconsideration Hearing Transcript 8/6/2018

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versus Delcore Homes.

Mr. Gill was essentially retired from the same company that Mr. Velez worked for. He worked there for 34 years. And he worked with Mr. Velez, he estimated approximately 80 times on jobs just like this. But that is all in the record.

And second, common work area doctrine, they were all there because there was a handful of people there because Mr. Gill brought them there. They were not separate contractors.

THE COURT: All right. Very good.
The Court will issue a written opinion.

MR. FISHBACK: Thank you Your Honor.

MR. MITCHELL: Thank you.

Exhibit 15 - , #~~68~~ Opinion and Order Denying Plaintiff's Motion for Reconsideration

Exhibit 15

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Exhibit 15 - , #~~688~~ Opinion and Order Denying Plaintiff's Motion for Reconsideration

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

SUSAN MOORE, GUARDIAN and
CONSERVATOR of the Estate of
JOSEPH DANIEL VELEZ, JR,
an incapacitated individual,

Plaintiff,

vs.

Case No. 2017-2389-NO

RICHARD SHAFER, KAREN SHAFER,
R. SHAFER BUILDERS, RICHARD N.
SHAFER, Trustee of Revocable Living
Trust Agreement dated 12/14/89;
KAREN J. SHAFER, Trustee of Revocable
Living Trust Agreement dated 12/14/89;

Defendants.

OPINION AND ORDER

Plaintiff Susan Moore ("Plaintiff"), guardian and conservator of the Estate of Joseph Daniel Velez, Jr., an incapacitated individual, has filed a motion for reconsideration of the Court's Opinion and Order dated June 6, 2018 granting defendants Richard Shafer ("Defendant Richard Shafer"), Karen Shafer, Richard N. Shafer as trustee of revocable living trust agreement dated 12/14/89, Karen J. Shafer as trustee of revocable living trust agreement dated 12/14/89, and R. Shafer Builders ("Defendant R. Shafer Builders") (collectively the "Shafer Defendants") motion for summary disposition. The Shafer Defendants filed a response in opposition to Plaintiff's motion.

In the interests of judicial economy the factual and procedural statements set forth in the Court's June 6, 2018 Opinion and Order are herein incorporated.

Exhibit 15 - , #688% Opinion and Order Denying Plaintiff's Motion for Reconsideration*Standard of Review*

A motion for rehearing or reconsideration must be filed and served no later than 21 days after entry of the Order. MCR 2.119(F). The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). A court's decision to grant a motion for reconsideration is an exercise of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658; 617 NW2d 368 (2000). The moving party must demonstrate palpable error by which the Court and the parties have been misled and show different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration that merely presents the same issues ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* However, courts are "permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). The trial court does not abuse its discretion "in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Chareneau v Wayne Co Gen Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Arguments

In her motion, Plaintiff contends that the Court made a palpable error by deciding the issue of foreseeability with regard to her premises liability claim as a matter of law. Plaintiff further argues that the Court made an additional palpable error in holding that

Exhibit 15 - , #688% Opinion and Order Denying Plaintiff's Motion for Reconsideration

she did not present any evidence to support her claims that the subject roof constituted a common work area.

In response, the Shafer Defendants maintain that Plaintiff has not presented any new evidence or argument that the subject roof was unreasonably dangerous or was a common work area.

Law and Analysis

Premises Liability

Plaintiff contends that the subject roof was unreasonably dangerous because the Shafer Defendants should have foreseen that Mr. Gill would fail in his responsibility to provide reasonably safe working conditions for his workers. First, Plaintiff relies on the evidence that Mr. Gill did not have an established business organization, employees or a safety program. Next, Plaintiff relies on the evidence that the Shafer Defendants removed the anchor on the roof for fall protection. Lastly, Plaintiff contends that the Shafer Defendants retained complete control of the project.

In response, the Shafer Defendants claim that Plaintiff has not provided any evidence that the roof contained any special aspects that differentiate it from a typical rooftop. The Shafer Defendants also present evidence that Mr. Gill was an experienced roofer. See Shafer Defendant's motion for summary disposition, Exhibit H, p. 5-7, 10. The Shafer Defendants also contend that taking adequate safety measures was Mr. Gill's duty under Michigan law and Plaintiff has not provided any evidence that they should have foreseen that Mr. Gill would not comply with the law. See *Latham v Barton Malow Co*, 480 Mich 105, 112 (2008).

Exhibit 15 - , #688% Opinion and Order Denying Plaintiff's Motion for Reconsideration

In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 19; 643 NW2d 212 (2002), the court differentiated between general contractor liability and liability of a possessor of premises. The *Perkoviq* court stated that the "fact that defendant may have additional duties in its role as a general contractor... does not alter the nature of the duties owed by virtue of its ownership of the premises. *Id.* The *Perkoviq* court held that "[a]s owner, [defendant] had no reason to foresee that the condition of the premises would be unreasonably dangerous, as the roof lacked any special aspects that would make it so." *Id.* The *Perkoviq* court went on to state that "a plaintiff must present evidence of 'special aspects' of the condition that differentiate it from the typical sloped rooftop containing ice, snow or frost." *Id.* at 20.

Here, Plaintiff has failed to present any evidence of a special aspect of the subject roof that differentiate it from a typical roof. *Id.* Thus, pursuant to the holding in *Perkoviq*, the Shafer Defendants had no reason to foresee that the condition of the subject roof would be unreasonably dangerous. *Id.* at 19. Further, Plaintiff has presented the same issues ruled upon by the Court. See *Hill*, 276 Mich App at 307. Therefore, the Court must deny Plaintiff's motion for reconsideration in regards to its premises liability claim.

Common Work Area Doctrine

Next, Plaintiff argues that it provided sufficient evidence to establish that the subject roof constituted a common work area. First, Plaintiff claims that the subject roof was a common area because each of Mr. Gill's workers was an independent contractor that was working on the subject roof. Plaintiff relies on the deposition testimony of Mr. Gill stating that seven of his workers performed work on the roof. See Plaintiff's response to the Shafer Defendants motion for summary disposition, Exhibit D, p. 11, Deposition

Exhibit 15 - , #688% Opinion and Order Denying Plaintiff's Motion for Reconsideration

transcript of Larry Gill. Next, Plaintiff relies on the deposition testimony of an employee of Defendant Richard Shafer and/or Defendant R. Shafer Builders, Elmo Madden. Mr. Madden testified that employees of Defendant Richard Shafer installed the roof trusses and roof decking. See Plaintiff's response to the Shafer Defendants motion for summary disposition, Exhibit C, p. 16-19. Plaintiff also relies on the deposition testimony of Mr. Madden stating that a plumber installed the downspouts and sumps for the roof. *Id.* at p. 26, 42-43. Lastly, Plaintiff presents the affidavit of Michael C. Wright, expert consultant and witness. See Plaintiff's response to the Shafer Defendants motion, Exhibit F. Mr. Wright states that Defendant Richard Shafer and/or Defendant R. Shafer Builders assigned three employees and one contract worker to work on the subject construction project. *Id.* at p. 5.

In response, the Shafer Defendants contend that Plaintiff fails to provide any evidence that the roof created a high degree of risk to a significant number of workmen. Plaintiff claims that the common work area doctrine applies only in cases "involving very large construction sites." *Funk v General Motors Corp*, 392 Mich 91, 110; 220 NW2d 641 (1974).

Next, the Shafer Defendants argue that employees of Defendant Richard Shafer and/or Defendant R. Shafer Builders were not exposed to the same risk at Mr. Gill's workers. See Shafer Defendants motion for summary disposition, Exhibit E, p. 20, Deposition transcript of Mark Allison; Exhibit F, p. 14, Deposition transcript of Thomas Shafer; Exhibit G, p. 26, 29, Deposition transcript of Elmo Madden. The Shafer Defendants also contend that the employees of Defendant Richard Shafer and/or Defendant R. Shafer Builders were direct employees and not subcontractors. See *Funk*,

Exhibit 15 - , #~~688~~ Opinion and Order Denying Plaintiff's Motion for Reconsideration

391 Mich at 102, 104. The Shafer Defendants also argue that the plumber only worked near the top of the addition and was not exposed to the same risks as Mr. Gill's workers. See Shafer Defendant's motion for summary disposition, Exhibit G, p. 29-30, Deposition transcript of Elmo Madden.

Based on the evidence provided, the Court is convinced that Plaintiff has failed to prove that the subject roof created a high degree of risk to a significant number of workmen in a common area. First, no evidence was provided that the plumber ever performed work on the subject roof (See Plaintiff's response to the Shafer Defendants motion for summary disposition, Exhibit C, p. 44-45, Deposition transcript of Elmo Madden) or that any other subcontractor performed work on the roof. Further, Plaintiff failed to provide any evidence that a significant number of workmen would eventually work on the subject roof. Therefore, Plaintiff's motion for reconsideration of its claim for liability under the common work area doctrine is denied.

Conclusion

For the reasons stated above, the Plaintiff's motion for reconsideration is DENIED. This Opinion and Order resolves the last pending claim and CLOSES this case. MCR 2.602(A)(3).

IT IS SO ORDERED.



RICHARD L. CARETTI
Circuit Court Judge

Dated: August 10, 2018

cc: George T. Fishback, Attorney for Plaintiff
Richard M. Mitchell, Attorney for Defendants